No. 92-1772

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

BROUGHTON LUMBER CO.,

Petitioner,

v.

COLUMBIA RIVER GORGE COMMISSION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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April 1993

QUESTIONS PRESENTED

1. Absent Eleventh Amendment concerns, does 28 U.S.C. §1331 confer federal court jurisdiction over regulatory takings disputes involving interstate compact agencies?

2. Do the jurisdictional provisions of the Columbia River Gorge National Scenic Area Act, 16 U.S.C. §544m(b)(4)-(6), confer federal subject matter jurisdiction over actions against the Columbia River Gorge Commission?

PARTIES TO THE PROCEEDING

Petitioner is Broughton Lumber Co., a Washington corporation. Petitioner has no corporate parent or subsidiaries.

Respondent is the Columbia River Gorge Commission, an interstate compact agency authorized by Congress and by the states of Oregon and Washington.

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BROUGHTON LUMBER CO.,

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v.

COLUMBIA RIVER GORGE
COMMISSION, et al.,

Respondents.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Petitioner Broughton Lumber Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case for review in that court.

OPINIONS BELOW

The Ninth Circuit's opinion as amended is reported at 975 F.2d 616 (9th Cir. 1992) and is reprinted at page A-1. The Ninth Circuit's original opinion is reprinted at A-22.

The district court's order adopting the magistrate's Findings and Recommendations granting respondent Columbia River Gorge Commission's motion to dismiss plaintiff's declaratory judgment claim, and remanding plaintiff's inverse condemnation claim against the Commission for further consideration is set out at A-40. The district court's order adopting on other grounds the magistrate's recommendation that the inverse condemnation claim against the Commission be dismissed is set out at A-42.

The order of the Commission's Executive Director denying petitioner's land use proposal and the

Commission's final order adopting its Executive Director's findings of fact and conclusions of law are set out at A-46 and A-48.

JURISDICTION

The court of appeals filed its original opinion on September 15, 1992. Petitioner timely filed a petition for rehearing on September 28, 1992. On December 2, 1992, the court of appeals filed an amended opinion without acting upon the petition for rehearing. Out of an abundance of caution, petitioner timely filed on December 16, 1992 a petition seeking rehearing of the amended opinion. On January 22, 1993, the court of appeals denied "the petition for rehearing," but did not indicate which of the two petitions was denied. On February 5, 1993, the court issued its mandate. This writ is filed within 90 days after January 22, 1993, and is timely

under Rule 13. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Two provisions of the United States Constitution are involved in this case, Article I's compact clause and the Fifth Amendment's takings clause. The compact clause reads in pertinent part: "No state shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State." U.S. Const. art. 1, §10, cl. 3. The takings clause reads: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

Four legislative acts are involved in this case, two federal and two state. The federal acts involved are the Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§544-544p (1992), and the federal question jurisdiction statute, 28 U.S.C. §1331 (1992). The two state

acts involved are the statutes passed by the legislative assemblies of Oregon and Washington that created the Columbia River Gorge Compact. See Or. Rev. Stat. §§196.150-.165 (1991) and Rev. Wash. Code §§43.97.015-.035 (1992). Pertinent provisions of the federal and state statutes are set out beginning at A-61.

STATEMENT OF THE CASE

A. Introduction.

Without hyperbole, the Columbia River Gorge National Scenic Area Act can be characterized as the most complex exercise in federalism in U.S. history. Within a 292,000-acre stretch of the Columbia River Gorge in Oregon and Washington, the federal government and a bi-state Commission have displaced six counties as the regulators of all land use.

Under the statutory scheme, the U.S. Forest Service in 1987 promulgated interim land use regulations that are

still in place and are administered by the Gorge Commission. The result is a land use regime that originates with federal drafters, but is applied by an interstate commission with far-reaching zoning authority but no power to compensate private landowners for regulatory takings. Ultimately, the Gorge Act contemplates that the Forest Service will develop half of the Scenic Area's land use designations, the Gorge Commission will prepare the other half, and then both halves will be adopted and administered by the Gorge Commission (or any county that elects to adopt ordinances in strict compliance with the Forest Service/Gorge Commission-authored regulations).[1]

---

[1] The Forest Service is required to draft the land use regulations for all public and private lands in the 115,000-acre special management area; the Gorge Commission has the same responsibility for the 149,000-acre general management area. The Gorge Commission must then accept the Forest Service designations without change and combine both halves into a management plan for the entire Scenic Area. 16 U.S.C. § 554f(a)(1)(f) and § 544d(c).

Thus, the Gorge Act embodies a "new wave" approach to resource preservation that employs intensive interstate regulation of private property rather than the traditional national park or national recreation area "acquisition" model. Indeed, the Gorge Act's regulatory thrust is being touted as a model for the preservation of other natural areas in the United States, including Jackson Hole, Big Sur, Napa Valley, Connecticut River Valley, Hudson River Valley, the Appalachicola River and Bay, the Mobile-Tensaw River Bottom Lands and the Greater Everglades Ecosystem.[2]

If these federally conditioned interstate arrangements are to function effectively and coherently, disputes regarding compact agencies' authority must be subject to federal judicial review. Otherwise, compact

---

[2] See The Oregonian, November 24, 1986, at 1, column 2.

agencies will be subjected to the conflicting and potentially irreconcilable directives of the courts of the participating states. Because Congress recognized this need for uniformity in expressly conferring federal jurisdiction under the Gorge Act, and because federal question jurisdiction applies in any event, the Ninth Circuit's analysis and decision must be corrected.

B. The Gorge Act and Interstate Compact.

In November 1986, Congress enacted the Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§544-544p. Under the Gorge Act, Congress authorized Oregon and Washington to enter into an interstate compact to regulate land use in specified areas of six Oregon and Washington counties which border the Columbia River for 83 miles.

The Gorge Act, and its implementing interstate compact, are similar to other regional resource

management mechanisms which have proliferated in recent years. See, e.g., Pacific Northwest Electric Power and Conservation Council, consented to by Congress, 16 U.S.C. §§839 et seq. (1982); Tahoe Regional Planning Compact, consented to by Congress, Pub. Law 91-148, 83 Stat. 360 (1969); Delaware River Basin Compact, consented to by Congress, Pub. Law 87-328, 75 Stat. 688 (1961). While the details vary, the basics are constant. In each instance, Congress has sanctioned the creation of a largely autonomous entity, neither "federal" nor "state," to engage in sweeping regulation and allocation of multistate resources.

Congress based its consent to the Oregon/Washington interstate compact on a variety of conditions. Pursuant to these conditions, Oregon and Washington each expressly incorporated the Gorge Act into

its compact legislation. See Or. Rev. Stat. §196.150 (1991); Rev. Wash. Code §43.97.015 (1992).

Also pursuant to these congressional conditions, the states established and empowered an interstate compact agency, the Columbia River Gorge Commission, to oversee the development of land-use planning in the bi-state Gorge Scenic Area. The Gorge Commission was, and is, further empowered to enforce such land-use restrictions. 16 U.S.C. § 544m(b)(1)(B).

In 1987, the Gorge Commission and the Secretary of Agriculture developed interim regulations governing land use in the Gorge Scenic Area. Those regulations, which are still in effect, have severely restricted land use in the Scenic Area, depriving many landowners of all economically viable use of their property.

In August 1988, petitioner Broughton Lumber Co. submitted a land use application to the Gorge

Commission to subdivide 108.53 acres which Broughton owns in the Scenic Area into three parcels for residential development. In January 1989, the Gorge Commission rejected this proposal. A-46.

Broughton then sued the Commission, Oregon, and Washington in the United States District Court for the District of Oregon. Broughton sought declaratory relief against the Commission and further, in the alternative, asserted an inverse condemnation claim against both states and the Commission.

In particular, Broughton sought a declaration that the Gorge Commission's denial of its application violated both the express conditions Congress placed on the interstate compact and the regulations promulgated under the compact. Alternatively, if the Commission's actions were determined to be lawful, Broughton alleged that those actions effected an uncompensated "taking." A-35.

The district court: (1) dismissed Broughton's claim for declaratory relief against the Commission, holding that the Gorge Act precluded federal jurisdiction over claims against the Commission; (2) dismissed Broughton's inverse condemnation claim against Oregon and Washington on Eleventh Amendment grounds; and (3) dismissed Broughton's inverse condemnation claim against the Commission as "unripe." A-35, 40 and 42.

The Ninth Circuit affirmed. A-1, 22.

Broughton now seeks review of the lower courts' holding that the district court lacked jurisdiction, including pursuant to 28 U.S.C. §1331, to consider Broughton's claim for declaratory relief against the respondent Gorge Commission.

REASONS FOR GRANTING WRIT

This case presents novel and important issues concerning the susceptibility of congressionally-authorized interstate compact agencies to federal jurisdiction. Given the proliferation of such agencies as a device for regional management of natural resources, these issues are increasingly important, particularly for citizens of the West.

Beyond the interstate compact-related issues, review is imperative to reiterate the proper scope of 28 U.S.C. §1331. The lower courts' "repeal by implication" treatment of federal question jurisdiction in this case contradicts this Court's consistent precedents that any abrogation of federal court jurisdiction must be express, not implied.

Finally, the proper construction of the Columbia River Gorge National Scenic Area Act itself is of

vital importance to thousands of citizens who reside and own property in the Scenic Area. Unless the Gorge Act is properly construed to afford uniform federal court review of Gorge Commission decisions, those citizens will be left without meaningful judicial review and remedies.

I. Disputes Concerning the Authority of Interstate Compact Agencies Are Subject to Federal Question Jurisdiction.

The Columbia River Gorge Commission, like any interstate compact agency, is an entity sanctioned by act of Congress. 16 U.S.C. §§544-544p. The Commission's raison d'etre is to implement the directives of omnibus federal legislation, the Columbia River Gorge National Scenic Area Act.

Nonetheless, the Ninth Circuit concluded that disputes involving the Gorge Commission's authority are not subject to federal court jurisdiction, specifically

including federal question jurisdiction. That conclusion must be corrected for two reasons:

First, given the nature and function of interstate compact agencies, such agencies must be subject to federal question jurisdiction unless Congress, in the enabling legislation, expressly abrogates such jurisdiction.

Second, in authorizing the creation of the Gorge Commission, Congress, rather than expressly abrogating federal court jurisdiction, explicitly provided for such jurisdiction over disputes involving the Commission. See 16 U.S.C. §544m(b)(4), discussed at pp. 20-24, infra. Indeed, any abrogation of federal jurisdiction would have frustrated the efficient interstate administration of the Gorge Act.

This Court has consistently held that where federal jurisdiction would otherwise apply, "repeal" of that jurisdiction must be explicit. Rosencrans v. United States,

165 U.S. 257 (1897), which involved criminal jurisdiction, described this principle:

> When there are statutes clearly defining the jurisdiction of the courts, the force and effect of such provisions should not be disturbed by a mere implication flowing from subsequent legislation. In other words, where Congress has expressly legislated in respect to a given matter, that express legislation must control, in the absence of subsequent legislation equally express, and is not overthrown by any mere inferences or implications to be found in such subsequent legislation.

165 U.S. at 262.

Applying this principle, this Court in Colorado River Water Cons. Dist. v. United States, 424 U.S. 800 (1975), determined that the McCarran Amendment did not repeal federal court jurisdiction to entertain federal water suits, including under 28 U.S.C. §1331:

> In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by

> implication is when earlier and later statutes are irreconcilable.

424 U.S. at 808 (construing McCarran Amendment to permit concurrent federal/state jurisdiction over such disputes).

Conversely, Lauf v. E.G. Shinner & Co., 303 U.S. 323 (1937), and Weinberger v. Salfi, 422 U.S. 749 (1975) exemplify the sort of express congressional language this Court requires to abrogate federal question jurisdiction. In E.G. Shinner & Co., the operative statute declared, "No court of the United States shall have jurisdiction . . . ." 303 U.S. at 329. In Salfi, the operative language directed, "No action against the United States, the Secretary, or any officer or employee thereof shall be brought under [§§1331 et seq.]." 422 U.S. at 746.[3]

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[3] Cf. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) (finding abrogation of federal question jurisdiction pursuant to Foreign Sovereign Immunities Act; relying, in part, on legislative history

Here, Congress, far from expressly "repealing" federal question jurisdiction over the Gorge Commission, explicitly provided for such jurisdiction. See pp. 20-24, infra. Indeed, the availability of federal judicial review, and concomitant uniformity, is imperative if the Gorge Commission--or any interstate compact agency--is to function responsibly.

The essence of an interstate compact is interstate consistency. Only federal judicial review can assure such consistency.

In this case, the Gorge Act's predominant purpose is to promote uniform protection for both the economy and the scenic, cultural, recreational, and natural resources of the bi-state Columbia Gorge Area. If, however, disputes regarding the Gorge Commission's

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establishing clear congressional intent to effect such a "repeal" of federal jurisdiction).

authority could be adjudicated only in the state courts of Oregon and Washington, the fundamental goal of interstate uniformity would be frustrated. The Commission would be subject to the competing, inconsistent, and perhaps inevitably irreconcilable mandates of the courts of two co-equal sovereigns. See generally Nevada v. Hall, 440 U.S. 410, 432-43 (1979) (Rehnquist, J., dissenting).

Nor are these concerns unique to the Gorge Commission. Interstate compacts are an increasingly favored mechanism for regional environmental and resource management. See, e.g., Nicholas A. Robinson, Environmental Regulation of Real Property §18.02 (1991); Frederick L. Zimmerman and Mitchell Wendell, The Law and Use of Interstate Compacts, ix, 102-109 (1976). The need for uniformity increases exponentially as the participants in such multistate arrangements double, and redouble.

Federal question jurisdiction assures that uniformity.[4] Because Congress recognized that reality, and the Ninth Circuit did not, review is imperative.

II. The Columbia River Gorge National Scenic Area Act Expressly Confers and Confirms Federal Court Jurisdiction Over Disputes Concerning the Gorge Commission's Authority.

The linchpin to the Ninth Circuit's analysis is its conclusion that certain provisions of the Gorge Act, 16 U.S.C. §544m(5) and (6), confer exclusive jurisdiction in the courts of Oregon and Washington to adjudicate disputes involving the Gorge Commission. See A-13 to 18.

This analysis ignores--indeed, reads out of the Gorge Act--16 U.S.C. §544m(b)(4):

> Any person or entity adversely affected by--

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[4] See Comment, "Federal Question Jurisdiction to Interpret Interstate Compacts," 64 Geo. L. J. 87 (1975).

* * *

> (B) any land use ordinance or interim guideline adopted pursuant to this act;
>
> (C) any appeal to the Commission pursuant to this section;
>
> * * *
>
> may appeal such action or order by filing in any of the courts specified in paragraph (5) . . . .

The "courts specified in paragraph (5)" are the United States district courts located in the states of Oregon and Washington. See 16 U.S.C. §544m(b)(5).[5]

Broughton was "adversely affected" by the Commission's denial of Broughton's appeal from the Executive Director's rejection of its land use application pursuant to 16 U.S.C. §544m. Consequently, pursuant to

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[5] The complete text of 16 U.S.C. §544m(b)(4), (5) and (6) is set out at A-70 to 76.

§544m(b)(4), Broughton was entitled to pursue its declaratory judgment action in district court seeking review of the Commission's adverse action.

The Ninth Circuit's conclusion to the contrary cannot be squared with §544m(b)(4). Because any reasonable construction of §544m(b)(4) compels jurisdiction, the Ninth Circuit's decision is sensible only if that provision is ignored.

Significantly, neither the Ninth Circuit nor the respondent Commission has ever offered a plausible construction of §544m(b)(4) that would give that provision substance without conferring federal jurisdiction.

The Ninth Circuit's "judicial expungement" of §544m(b)(4) violates this Court's canon that jurisdictional statutes must be construed "with precision and with fidelity to the terms by which Congress has expressed its wishes." Palmore v. United States, 411 U.S. 389, 396

(1973) (quoting Cheng Fan Kwok v. INS, 392 U.S. 206, 212 (1968)). Most recently, in Port Auth. Trans-Hudson v. Feeney, 495 U.S. 299, (1990) this Court reiterated this principle in rejecting the suggestion that the venue provision of an interstate compact should be given no meaning and ignored:

> Petitioner essentially presents the choice between giving the venue provision its natural meaning and giving the provision no meaning at all. Charged with giving effect to the statute, we do not find the choice to be a difficult one.

499 U.S. at 308.

Section 544m(b)(4) has only one "natural meaning." That statute expresses Congress' determination to promote the policy of interstate uniformity by explicitly identifying the federal courts as an appropriate form for

resolving Commission-related disputes.[6] If the Gorge Act is to be coherent, that intent must be given effect.

CONCLUSION

The Ninth Circuit's decision incorrectly analyzes and resolves exceptionally important questions of federal jurisdiction over interstate compact agencies.

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[6] Accord Goble, "The Compact Clause and Transboundary Problems: 'A Federal Remedy for the Disease Most Incident to a Federal Government,'" 17 Envtl. L. 785, 791 (1987) (Gorge Act "expressly confer[s] jurisdiction on the federal courts to resolve disputes concerning compact provisions").

Petitioner respectfully requests that the Court grant the petition for writ of certiorari.

Respectfully submitted this 22nd day of April, 1993.

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April 1993

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH COURT

BROUGHTON LUMBER COMPANY,	)	No. 91-35183
Plaintiff-Appellant,	)	D.C. No. CV-89-234-JU
v.	)	AMENDED ORDER AND OPINION
COLUMBIA RIVER GORGE COMMISSION, et al.,	)	
Defendants-Appellees	)	

Appeal from the United States District Court for the District of Oregon.

Before WALLACE, Chief Judge, and GOODWIN, Circuit Judge, and CROCKER, District Judge.[1]

ORDER

The opinion filed in this case on September 15, 1992, slip opinion 11201, is amended as follows:

---

[1] Honorable Myron D. Crocker, Senior United States District Judge for the Eastern District of California, sitting by designation.

1. In the last paragraph at the end of the fourth sentence on slip. op. at 11206, replace the following short citation:

Scanlon with *Atascadero*.

2. At the beginning of the last paragraph on slip. op. at 11207, before the sentence beginning "Thus, Congress . . ." insert the following sentence:

> In contrast, Congress' approval of the Columbia River Gorge Compact (Compact) merely stated "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled." Act of Nov. 17, 1986, Pub. L. No. 99-663, 100 Stat. 4274 (1986).

3. In the last paragraph in the middle of the sentence beginning "Thus, Congress . . ." on slip. op. at 11207, replace the following:

Gorge Compact with Compact.

4. At the end of the first sentence and at the top of slip. op. at 11208, replace the following:

Federal Court with federal court.

5. In the last paragraph at the beginning of the first sentence on slip. op. at 11208, replace the following:

subsections with paragraphs.

6. Insert the following paragraph before the first paragraph on slip. op. at 11209:

Section 544m(b)(4) of 16 U.S.C. provides:

(4) **Judicial review**

Any person or entity adversely affected by --

(A) any final action or order of a county, the Commission, or the Secretary relating to the implementation of sections 544 to 554p of this title;

(B) any land use ordinance or interim guideline adopted pursuant to sections 544 to 544p of this title;

(C) any appeal to the Commission pursuant to this section;

(D) any civil penalty assessed by the Commission pursuant to paragraph (a)(3) of this subsection may appeal such action or order by filing in any of the courts specified in paragraph (5) of this subsection, within sixty days after the date of service of such order or within sixty days after such action is taken, a written petition requesting such action, order, land use ordinance, interim guideline, or appeal taken to the Commission be modified, terminated, or set aside.

Section 544m(b)(5) provides:

> (5) **Federal court jurisdiction**
>
> The United States district courts located in the States of Oregon and Washington **shall** have jurisdiction over--
>
> (A) any criminal penalty imposed pursuant to section 551 of this title, or any other applicable law for violation of any order, regulation or other action taken by the Secretary pursuant to sections 544 to 544p of this title;
>
> (B) any civil action brought against the Secretary pursuant to this section; or
>
> (C) any appeal of any order, regulation, or other action of the Secretary taken pursuant to paragraph (4) of this subsection.

(emphasis added). In contrast, 16 U.S.C. § 544m(b)(6) provides:

> (6) **State court jurisdiction**
>
> The State courts of the States of Oregon and Washington **shall** have jurisdiction--

(A) to review any appeals taken to the Commission pursuant to subsection (a)(2) of this section;

(B) over **any civil action brought** by the Commission pursuant to subsection (b)(1) of this section or **against the Commission,** a State, or a county pursuant to subsection (b)(2) of this section;[4]

(C) over any appeal of any order, regulation, or other action of the Commission or a county taken pursuant to paragraph 4 of this subsection; or

---

[4] Subsection (b)(2) provides:

(2) **Citizens suits**

Any person or entity adversely affected may commence a civil action to compel compliance with sections 544 to 544p of this title--

(A) against the Secretary, the Commission or any county where there is alleged a violation of the provisions of sections 544 to 544p of this title, the management plan or any land use ordinance or interim guideline adopted or other action taken by the Secretary, the Commission, or any county pursuant to or Commission under sections 544 to 544p of this title; . . .

> (D) any civil penalties assessed by the Commission pursuant to subsection (a)(3) of this section.

(emphasis added). Thus, although paragraph 4 might be read to vest jurisdiction over all appeals in the federal district courts of Oregon and Washington, subparagraphs (5)(C) and (6)(C) point to a different conclusion -- the state courts have exclusive jurisdiction over actions involving and appeals from the Commission, while the federal courts' jurisdiction is reserved for actions involving and appeals from the Secretary.

7. Delete the entire first paragraph beginning with the sentence "Section 544m(b)(6) of 16 U.S.C. provides: . . ." on slip. op. at 11209 and ending with the sentence "The federal courts' jurisdiction is reserved for actions brought by or against the Secretary, not the Commission." on slip. op. at 11210.

8. Insert the following sentence at the end of the first partial paragraph on slip. op. at 11211:

> We conclude that the effect of 16 U.S.C. § 544m(b)(4)-(6) is to vest the federal district courts of Oregon and Washington with jurisdiction over only those actions involving the Secretary, and to leave to the state courts jurisdiction over actions involving the Commission.

9. The first full sentence on slip. op. at 11212 should read as follows:

> Broughton argues that the district court improperly dismissed its inverse condemnation action against the Commission because the States' waiver of immunity obviates the need for the ripeness requirement to be met and because the States' compensatory procedures for unconstitutional takings without just compensation are inadequate.

10. The first sentence in the second full paragraph on slip. op. at 11213 should read as follows:

> Broughton argues that the States' waiver of immunity obviates the need for the ripeness requirement to be met.

11. The second sentence in the second full paragraph on slip. op. at 11213 should read as follows:

> Assuming *arguendo* that the States' waiver of the sovereign immunity would obviate the need for the ripeness requirement to be met, Broughton's argument must fail because, as set forth above, the States have not waived their sovereign immunity.

12. In the last paragraph near the end of the first sentence on slip. op. at 11213, replace the following:

prong with prerequisite.

OPINION

CROCKER, District Judge:

Broughton Lumber Company (Broughton) appeals the district court's order dismissing its inverse condemnation action against the states of Oregon and Washington (the States) and its declaratory judgment and inverse condemnation actions against the Columbia River Gorge Commission (Commission) brought pursuant to 16 U.S.C. §§ 544-544p (1989). We affirm.

BACKGROUND

Broughton, a Washington Corporation, owns a 108.53 acre lot within the Columbia River Gorge National Scenic Area. In August, 1988, Broughton submitted a land use application to the Commission to subdivide its 108.53 acre lot into three parcels for residential development. The Executive Director (Director) of the Commission denied Broughton's application on October 25, 1988.

Broughton appealed the Director's decision to the Commission. On January 24, 1989, the Commission adopted the Director's findings of fact and conclusions of law, upheld the Director's decision, and denied Broughton's appeal.

Broughton filed a civil complaint in the United States District Court for the District of Oregon against the Commission, the states of Oregon and Washington, the

United States, and the Secretary of the United States Department of Agriculture (Secretary).[1]

The district court dismissed Broughton's inverse condemnation action against the states of Oregon and Washington for lack of jurisdiction. Broughton appeals this decision arguing that the Eleventh Amendment does not bar its cause of action because Congress has abrogated Oregon's and Washington's sovereign immunity and the Commission's waiver of immunity can be imputed to Oregon and Washington.

Next, the district court dismissed Broughton's declaratory judgment action against the Commission for lack of subject matter jurisdiction. The district court found that the Columbia River Gorge National Scenic Area Act (Gorge Act), 16 U.S.C. §§ 544-544p, did not confer jurisdiction upon the federal courts for actions involving the Commission. Broughton appeals this decision arguing that the federal courts have subject matter jurisdiction pursuant to the Gorge Act and 28 U.S.C. § 1331.

Finally, the district court dismissed Broughton's inverse condemnation claim against the Commission because it was unripe for judicial review. Broughton appeals this decision arguing that the States' waiver of sovereign immunity obviates the need for the ripeness requirement to be met, and the States' compensatory procedures for unconstitutional takings without just compensation are inadequate.

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[1] The district court dismissed Broughton's actions against the United States and the Secretary for lack of subject matter jurisdiction. Broughton does not appeal the district court's decision as to these two defendants.

STANDARD OF REVIEW

[1] This court reviews the existence of subject matter jurisdiction in the district court de novo. Allah v. Superior Court of California, 871 F.2d 887, 890 (9th Cir. 1989) (citing Peter Starr Prod. Co. v. Twin Continental Films, Inc., 783 F.2d 1440, 1442 (9th Cir. 1986)).

DISCUSSION

I

[2] The Eleventh Amendment to the United States Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The Eleventh Amendment has been construed to extend to suits brought against a state by its own citizens as well as by citizens of other states. Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890). As a result, federal courts are prohibited from hearing suits brought against unconsenting states. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100, 104 S.Ct. 900, 908, 79 L.Ed.2d 67 (1984).

[3] The Eleventh Amendment bar to suits against states in federal court is not absolute. First, Congress may abrogate the States' constitutionally secured immunity by expressing, in unmistakably clear language, its intention to allow the states to be sued in federal court. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242-43, 105 S.Ct. 3142, 3147-48, 87 L.Ed.2d 171 (1985). Second, a state may waive its Eleventh Amendment immunity and consent to be sued in federal court. Id. at 241, 105 S.Ct. at 3146; Clark v. Barnard, 108 U.S. 436, 447, 2 S.Ct. 878, 883, 27 L.Ed. 780 (1883).

"[A] State will be deemed to have waived its immunity 'only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.'" Atascadero, 473 U.S. at 239-40, 105 S.Ct. at 3146 (quoting Edelman v. Jordan, 415 U.S. 651, 673, 94 S.Ct. 1347, 1361, 39 L.Ed. 2d 662 (1974) (internal quotation omitted)). "Although a State's general waiver of sovereign immunity may subject it to suit in state court, it is not enough to waive the immunity guaranteed by the Eleventh Amendment." Atascadero, 473 U.S. at 241, 105 S.Ct. at 3146.

Broughton relies on Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959), to support its contention that Congress has abrogated the States' immunity, Petty, however, is distinguishable from the present case.

In Petty, Tennessee and Missouri created an agency by entering into a bi-state compact. The compact provided that the respondent agency should have the power to build a bridge and operate ferries across the Mississippi River at specified points and that it should have the power "to contract, to sue and be sued in its own name." Id. at 277, 79 S.Ct. at 788. Congress granted approval of the compact, explicitly stating:

> That nothing herein contained shall be construed to affect, impair, or diminish any right, power, or jurisdiction of the United States or of any court, department, board, bureau, officer, or official of the United States, over or in regard to any navigable waters, or any commerce between the States or with foreign countries, or any bridge, railroad, highway,

> pier, wharf, or other facility or improvement, or any other person, matter, or thing, forming the subject matter of the aforesaid compact or agreement or otherwise affected by the terms thereof.

Id. at 277-78, 79 S.Ct. at 788 (emphasis by Court). Congress could have adopted, as federal law, the law of either or both of the States. Id. at 280 , 79 S.Ct. at 789. Instead, Congress approved the sue-and-be-sued clause in the compact under conditions that clearly provided that the States accepting it waived any immunity from suit. Id.

[4] In contrast, Congress' approval of the Columbia River Gorge Compact (Compact) merely stated "Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled." Act of Nov. 17, 1986, Pub.L. No. 99-663, 100 Stat. 4274 (1986). Thus, Congress did not clearly provide that the states joining the Compact waived their sovereign immunity. Nor does this terse enactment provision constitute an "unmistakably clear" statement of Congress' intent to abrogate Oregon's and Washington's immunity to suit in federal court. See Atascadero, 473 U.S. at 242, 105 S.Ct. at 3147.

[5] Next, Broughton argues that the Gorge Act and the Compact are replete with references to the Commission's waiver of sovereign immunity. Broughton further argues that the Commission's waiver of sovereign immunity can be imputed to the States. Although the Compact contains a provision empowering the Commission to "sue and be

sued",[2] the Commission has not explicitly waived its sovereign immunity to suits in federal court. Pursuant to 16 U.S.C. § 544m(b)(6), actions involving the Commission shall be brought in the state courts of Oregon and Washington. The Commission's waiver of sovereign immunity in the state courts does not act as a waiver of Eleventh Amendment immunity in the federal courts.[3] See Atascadero, 473 U.S. at 241, 105 S.Ct. at 3146.

Because Broughton has failed to demonstrate that Congress has abrogated the States' immunity or that the States have waived their sovereign immunity, Broughton's inverse condemnation action is barred by the Eleventh Amendment and the district court properly dismissed this action.

II

[6] Broughton appeals the district court's dismissal of its declaratory judgment action against the Commission. Broughton argues that the federal courts have subject matter jurisdiction over its declaratory judgment action pursuant to 16 U.S.C. § 544m(b)(4)-(6).

Although paragraphs 4, 5, and 6 when read individually are ambiguous, when read collectively they clearly

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[2] Or. Rev. Stat. § 196.150; Wash. Rev. Code § 43.97.015.

[3] Because the Commission has not waived its sovereign immunity in the federal courts this court finds it unnecessary to determine whether the Commission's immunity can be imputed to the States.

confer mandatory jurisdiction upon the state courts for actions involving the Commission.

Section 544m(b)(4) of 16 U.S.C. provides:

(4) **Judicial review**

Any person or entity adversely affected by--

(A) any final action or order of a county, the Commission, or the Secretary relating to the implementation of sections 544 to 544p of this title;

(B) any land use ordinance or interim guideline adopted pursuant to sections 544 to 544p of this title;

(C) any appeal to the Commission pursuant to this section;

(D) any civil penalty assessed by the Commission pursuant to paragraph (a)(3) of this subsection may appeal such action or order by filing in any of the courts specified in paragraph (5) of this subsection, within sixty days after the date of service of such order or within sixty days after such action is taken, a written petition requesting such action, order, land use ordinance, interim guideline, or appeal taken to the Commission be modified, terminated, or set aside.

Section 544m(b)(5) provides:

(5) **Federal court jurisdiction**

The United States district courts located in the States of Oregon and Washington shall have jurisdiction over--

(A) any criminal penalty imposed pursuant to section 551 of this title, or any other applicable law for violation of any order, regulation or other action taken by the Secretary pursuant to sections 544 to 544p of this title;

(B) any civil action brought against the Secretary pursuant to this section; or

(C) any appeal of any order, regulation, or other action of the Secretary taken pursuant to paragraph (4) of this subsection. (emphasis added).

In contrast, 16 U.S.C. § 544m(b)(6) provides:

(6) **State court jurisdiction**

The State courts of the States of Oregon and Washington shall have jurisdiction--

(A) to review any appeals taken to the Commission pursuant to subsection (a)(2) of this section;

(B) over any civil action brought by the Commission pursuant to subsection (b)(1) of this section or against the Commission, a State, or a county pursuant to subsection (b)(2) of this section;[4]

(C) over any appeal of any order, regulation or other action of the Commission or a county taken pursuant to paragraph (4) of this subsection; or

(D) any civil penalties assessed by the Commission pursuant to subsection (a)(3) of this section.

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[4] Subsection (b)(2) provides:

(2) **Citizens suits**

Any person or entity adversely affected may commence a civil action to compel compliance with sections 544 to 544p of this title--

(A) against the Secretary, the Commission or any county where there is alleged a violation of the provisions of sections 544 to 544p of this title, the management plan or any land use ordinance or interim guideline adopted or other action taken by the Secretary, the Commission, or any county pursuant to or Commission under sections 544 to 544p of this title; ...

(emphases added). Thus, although paragraph 4 might be read to vest jurisdiction over all appeals in the federal district courts of Oregon and Washington, subparagraphs (5)(C) and (6)(C) point to a different conclusion-- the state courts have exclusive jurisdiction over actions involving and appeals from the Commission, while the federal courts' jurisdiction is reversed for actions involving and appeals from the Secretary.

Congressional commentary supports limiting the federal courts' jurisdiction to actions involving the Secretary. In a section-by-section analysis of the bill, the congressional record states that the "[f]ederal courts have jurisdiction over actions appealing an order of the Secretary, civil actions against the Secretary, or the imposition of criminal penalties resulting from a decision of the Secretary or a violation of an order of the Secretary." 132 Cong. Rec. S15, 645 (daily ed. Oct. 8, 1986) (statement of Sen. Gorton). In contrast, the "states of Oregon and Washington have jurisdiction to review appeals taken by the Commission, any civil action brought by the Commission, or any civil penalties assessed by the Commission."[5] Id.; see also Bowen Blair, Jr., The Columbia River Gorge National Scenic Area: The Act, Its Genesis and Legislative History, 17 Envtl.L. 863, 964 (Spring, 1987) ("State courts in Oregon and Washington retain jurisdiction over appeals of county actions taken to the Commission; civil actions brought by the Commission; citizen actions brought against the Commission, a state, or county; appeals of

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[5] Additionally, Congress rejected several bills containing broader grants of jurisdiction upon the federal district courts. H.R. 4161, 99th Cong., 2d Sess. (1986); H.R. 4221, 99th Cong., 2d Sess. (1986); H.R. 5583, 99th Cong., 2d Sess. (1986); H.R. 5625, 99th Cong., 2d Sess. (1986).

Commission or county orders, regulations, and actions; and any civil penalties assessed by the Commission " (footnotes omitted)). We conclude that the effect of 16 U.S.C. § 544(b)(4)-(6) is to vest the federal district courts of Oregon and Washington with jurisdiction over only those actions involving the Secretary, and to leave to the state courts jurisdiction over actions involving the Commission.

[7] Broughton further contends that the district court had jurisdiction over its declaratory judgment action pursuant to 28 U.S.C. § 1331, the general federal question jurisdictional provision. This contention is without merit, as the jurisdictional provisions of the Gorge Act, 16 U.S.C. § 544m(b)(5)-(6), are more specific than section 1331's grant of jurisdiction. Therefore, the provisions of the Gorge Act are controlling. See Busic v. United States, 446 U.S. 398, 406, 100 S.Ct. 1747, 1753, 64 L.Ed.2d 381 (1980).

Because the federal district courts lack subject matter jurisdiction over Broughton's declaratory judgment action against the Commission the district court properly dismissed this action.

III

Broughton appeals the district court's dismissal of its inverse condemnation action against the Commission, Broughton argues that the district court improperly dismissed its inverse condemnation action against the Commission because the States' waiver of immunity obviates the need for the ripeness requirement to be met and because the States' compensatory procedures for unconstitutional takings without just compensation are inadequate.

[8] The basic rationale of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Abbott Laboratories v. Gardner, 387 U.S. 136, 148, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967), overruled on other grounds, Califano v. Sanders, 430 U.S. 99, 105, 97 S.Ct. 980, 984, 51 L.Ed.2d 192 (1977). If a claim is not ripe for review, the federal courts lack subject matter jurisdiction and they must dismiss the claim. Southern Pac. Transp. Co. v. Los Angeles, 922 F.2d 498, 502 (9th Cir. 1990), cert. denied, -- U.S. ---, 112 S.Ct. 382, 116 L.Ed.2d 333 (1991).

[9][10] Constitutional challenges to local land use regulations are not considered by federal courts until they are "ripe" for federal adjudication. Id. at 502. Ripeness in an as-applied challenge to a local land use regulation requires the fulfillment of two prerequisites. First, the plaintiff must show that it has obtained a "'final and authoritative determination of the type and intensity of development legally permitted on the subject property.'" Id. (quoting MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 348, 106 S.Ct. 2561, 2566, 91 L.Ed.2d 285 (1986)). Second, because the Constitution prohibits only takings without just compensation, "'if a State provides an adequate procedure for seeking just compensation,' plaintiffs may not bring as-applied claims to federal court until they have 'used the procedure and been denied just compensation.'" Id. at 503 (quoting Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 195, 105 S.Ct. 3108, 3121, 87 L.Ed.2d 126 (1985)). Courts look to the time when the alleged taking without just compensation occurred to determine whether reasonable state procedures were available. Southern Pacific Transp. Co., 922 F.2d at 504 (citations omitted).

[11] Alternatively, a landowner who files suit in federal court before seeking compensation from the state "'bears the burden of establishing that state remedies are inadequate." Del Monte Dunes at Monterey v. Monterey, 920 F.2d 1496, 1506-07 (9th Cir. 1990) (quoting Austin v. Honolulu, 840 F.2d 678, 680 (9th Cir. 1988), cert. denied, 488 U.S. 852, 109 S.Ct. 136, 102 L.Ed. 2d 109 (1988)).

[12] Broughton argues that the States' waiver of immunity obviates the need for the ripeness requirement to be met. Assuming arguendo that the States' waiver of sovereign immunity would obviate the need for the ripeness requirement to be met, Broughton's argument must fail because, as set forth above, the States have not waived their sovereign immunity. Furthermore, Broughton has not provided evidence sufficient to establish that either Oregon's or Washington's procedures were inadequate, nor has it demonstrated that the Gorge Act contravenes the state courts' power to award monetary damages if the appropriate criteria are satisfied.

Broughton does not dispute that both States provide compensation for regulatory takings.[6] Yet, Broughton failed to seek compensation from Oregon or Washington prior to filing this action in federal court.

Because Broughton did not demonstrate the inadequacy of the States' compensatory procedures and because

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[6] See Presbytery of Seattle v. King County, 114 Wash.2d 320, 336, 787 P.2d 907 (1990), cert. denied, --- U.S. ---, 111 S.Ct. 284, 112, L.Ed.2d 238 (1990); Fifth Avenue Corp. v. Washington County, 282 Or. 591, 614, 581 P.2d 50 (1978).

it failed to seek compensation from Oregon or Washington prior to filing its suit in federal court, Broughton has failed to satisfy the second prerequisite of the ripeness requirement.[7] Broughton's inverse condemnation action against the Commission is, therefore, unripe for judicial review and the district court properly dismissed this action.

AFFIRMED.

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[7] Because Broughton failed to satisfy the second prerequisite of the ripeness test, this court finds it unnecessary to examine the first prerequisite.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH COURT

BROUGHTON LUMBER COMPANY,	)	No. 91-35183
Plaintiff-Appellant,	)	D.C. No. CV-89-234-JU
v.	)	OPINION
COLUMBIA RIVER GORGE COMMISSION, et al.,	)	
Defendants-Appellees.	)	

OPINION

CROCKER, District Judge:

Broughton Lumber Company (Broughton), appeals the district court's order dismissing its inverse condemnation action against the states of Oregon and Washington (the States) and its declaratory judgment and inverse condemnation actions against the Columbia River Gorge Commission (Commission) brought pursuant to 16 U.S.C. §§ 544-544p (1989). We affirm.

BACKGROUND

Broughton, a Washington Corporation, owns a 108.53 acre lot within the Columbia River Gorge national Scenic Area. In August, 1988, Broughton submitted a land use

application to the Commission to subdivide its 108.53 acre lot into three parcels for residential development. The Executive Director (Director) of the Commission denied Broughton's application on October 25, 1988.

Broughton appealed the Director's decision to the Commission. On January 24, 1989, the Commission adopted the Director's findings of fact and conclusions of law, upheld the Director's decision, and denied Broughton's appeal.

Broughton filed a civil complaint in the United States District Court for the District of Oregon against the Commission, the states of Oregon and Washington, the United States, and the Secretary of the United States Department of Agriculture (Secretary).[1]

The district court dismissed Broughton's inverse condemnation action against the states of Oregon and Washington for lack of jurisdiction. Broughton appeals this decision, arguing that the Eleventh Amendment does not bar its cause of action because Congress has abrogated Oregon's and Washington's sovereign immunity and the Commission's waiver of immunity can be imputed to Oregon and Washington.

Next, the district court dismissed Broughton's declaratory judgment action against the Commission for lack of subject matter jurisdiction. The district court found that the Columbia River Gorge National Scenic Area Act (Gorge

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[1] The district court dismissed Broughton's actions against the United States and the Secretary for lack of subject matter jurisdiction. Broughton does not appeal the district court's decision as to these two defendants.

Act), 16 U.S.C. §§ 544-544p, did not confer jurisdiction upon the federal courts for actions involving the Commission. Broughton appeals this decision arguing that the federal courts have subject matter jurisdiction pursuant to the Gorge Act and 28 U.S.C. § 1331.

Finally, the district court dismissed Broughton's inverse condemnation claim against the Commission because it was unripe for judicial review. Broughton appeals this decision arguing that the States' waiver of sovereign immunity obviates the need for the ripeness requirement to be met, and the States' compensatory procedures for unconstitutional takings without just compensation are inadequate.

STANDARD OF REVIEW

This court reviews the existence of subject matter jurisdiction in the district court de novo. Allah v. Superior Court of California, 871 F.2d 887, 890 (9th Cir. 1989) (citing Peter Starr Prod. Co. v. Twin Continental Films, Inc., 783 F.2d 1440, 1442 (9th Cir. 1986).

DISCUSSION

I

Broughton appeals the district court's dismissal of its inverse condemnation action against the states of Oregon and Washington. Broughton contends that its inverse condemnation action against the States is proper in federal court because Congress, by the terms of the Gorge Act, has abrogated the States' immunity. Additionally, Broughton argues that the Commission has waived its Eleventh Amendment immunity and that the Commission's waiver of immunity may be imputed to the States.

The Eleventh Amendment to the United States Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens, or Subjects of any Foreign State." U.S. Const. amend. XI. The Eleventh Amendment has been construed to extend to suits brought against a state by its own citizens as well as by citizens of other states. Hans v. Louisiana, 134 U.S. 1 (1890). As a result, federal courts are prohibited from hearing suits brought against unconsenting states. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984).

The Eleventh Amendment bar to suits against states in federal court is not absolute. First, Congress may abrogate the States' constitutionally secured immunity by expressing, in unmistakably clear language, its intention to allow the states to be sued in federal court. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242-43 (1985). Second, a state may waive its Eleventh Amendment immunity and consent to be sued in federal court. Id. at 241; Clark v. Barnard, 108 U.S. 436, 447 (1883). "[A] State will be deemed to have waived its immunity 'only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.'" Scanlon, 473 U.S. at 239-40 (quoting Edelman v. Jordan, 415 U.S. 651, 673 (1974) (internal quotation omitted)). "Although a State's general waiver of sovereign immunity may subject it to suit in state court, it is not enough to waive the immunity guaranteed by the Eleventh Amendment." Atascadero, 473 U.S. at 241.

Broughton relies on Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959), to support its

contention that Congress has abrogated the States' immunity. Petty, however, is distinguishable from the present case.

In Petty, Tennessee and Missouri created an agency by entering into a bi-state compact. The compact provided that the respondent agency should have the power to build a bridge and operate ferries across the Mississippi River at specified points and that it should have the power "to contract, to sue and be sued in its own name." Id. at 277, 79 S.Ct. at 788. Congress granted approval of the compact, explicitly stating:

> That nothing herein contained shall be construed to affect, impair, or diminish any right, power, or jurisdiction of the United States or of any court, department, board, bureau, officer, or official of the United States, over or in regard to any navigable waters, or any commerce between the States or with foreign countries, or any bridge, railroad, highway, pier, wharf, or other facility or improvement, or any other person, matter, or thing, forming the subject matter of the aforesaid compact or agreement or otherwise affected by the terms thereof.

Id. at 277-78 (emphasis by Court). Congress could have adopted, as federal law, the law of either or both of the States. Id. at 280. Instead, Congress approved the sue-and-be-sued clause in the compact under conditions that clearly provided that the States accepting it waived any immunity from suit. Id.

[1] Thus, Congress did not clearly provide that the states joining the Gorge Compact waived their sovereign

immunity. Nor does this terse enactment provision constitute an "unmistakably clear" statement of Congress' intent to abrogate Oregon's and Washington's immunity to suit in Federal Court. See Atascadero, 473 U.S. at 242.

[2] Next, Broughton argues that the Gorge Act and the Compact are replete with references to the Commission's waiver of sovereign immunity. Broughton further argues that the Commission's waiver of sovereign immunity can be imputed to the States. Although the Compact contains a provision empowering the Commission to "sue and be sued",[2] the Commission has not explicitly waived its sovereign immunity to suits in federal court. Pursuant to 16 U.S.C. § 544m(b)(6), actions involving the Commission shall be brought in the state courts of Oregon and Washington. The Commission's waiver of sovereign immunity in the state courts does not act as a waiver of Eleventh Amendment immunity in the federal courts.[3] See Atascadero, 473 U.S. at 241.

Because Broughton has failed to demonstrate that Congress has abrogated the States' immunity or that the States have waived their sovereign immunity, Broughton's inverse condemnation action is barred by the Eleventh Amendment and the district court properly dismissed this action.

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[2] Or. Rev. Stat. § 196.150; Wash. Rev. Code § 43.97.015.

[3] Because the Commission has not waived its sovereign immunity in the federal courts this court finds it unnecessary to determine whether the Commission's immunity can be imputed to the States.

II

Broughton appeals the district court's dismissal of its declaratory judgment action against the Commission. Broughton argues that the federal courts have subject matter jurisdiction over its declaratory judgment action pursuant to 16 U.S.C. § 544m(b)(4)-(6).

[3] Although subsections 4, 5, and 6 when read individually are ambiguous, when read collectively they clearly confer mandatory jurisdiction upon the state courts for actions involving the Commission.

Section 544m(b)(6) of 16 U.S.C. provides:

> (6) **State court jurisdiction**
>
> The State courts of the States of Oregon and Washington **shall** have jurisdiction --
>
> > (A) to review any appeals taken to the Commission pursuant to subsection (a)(2) of this section;
> >
> > (B) over **any civil action brought** by the Commission pursuant to subsection (b)(1) of this section or **against the Commission**, a State, or a county pursuant to subsection (b)(2) of this Section;[4]

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[4] Subsection (b)(2) provides:

> (2) **Citizens suits**

(C) over any appeal of any order, regulation, or other action of the Commission or county taken pursuant to paragraph 4 of this subsection; or

(D) any civil penalties assessed by the Commission pursuant to subsection (a)(3) of this section.

(emphasis added). In contrast, 16 U.S.C. § 544m(b)(5) provides:

(5) **Federal court jurisdiction**

The United States district courts located in the States of Oregon and Washington **shall** have jurisdiction over--

(A) any criminal penalty imposed pursuant to section 551 of this title, or any other

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Any person or entity adversely affected may commence a civil action to compel compliance with sections 544 to 544p of this title --

(A) against the Secretary, the Commission or any county where there is alleged a violation of the provisions of sections 544 to 544p of this title, the management plan or any land use ordinance or interim guideline adopted or other action taken by the Secretary, the Commission, or any county pursuant to or Commission under Sections 544 to 544p of this title; ...

> applicable law for violation of any order, regulation or other action taken by the Secretary pursuant to sections 544 to 544p of this title;
>
> (B) any civil action brought against the Secretary pursuant to this section; or
>
> (C) any appeal of any order, regulation, or other action of the Secretary taken pursuant to paragraph (4) of this subsection.

(emphasis added). The federal courts' jurisdiction is reserved for actions brought by or against the Secretary, not the Commission.

Congressional commentary supports limiting the federal courts' jurisdiction to actions involving the Secretary. In a section-by-section analysis of the bill, the congressional record states that the "[f]ederal courts have jurisdiction over actions appealing an order of the Secretary, civil actions against the Secretary, or the imposition of criminal penalties resulting from a decision of the Secretary or a violation of an order of the Secretary." 132 Cong. Rec. S15,645 (daily ed. Oct. 8, 1986) (statement of Sen. Gorton). In contrast, the "states of Oregon and Washington have jurisdiction to review appeals taken by the Commission, any civil action brought by the Commission, or any civil penalties assessed by the Commission."[5] Id.; see also Bowen Blair, Jr., The Columbia

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[5] Additionally, Congress rejected several bills containing broader grants of jurisdiction upon the federal district courts. H.R. 4161, 99th Cong., 2d Sess. (1986); H.R. 4221, 99th Cong., 2d Sess. (1986); H.R. 5583, 99th

River Gorge National Scenic Area: The Act, Its Genesis and Legislative History, 17 Envtl.L. 863, 964 (Spring, 1987) ("State courts in Oregon and Washington retain jurisdiction over appeals of county actions taken to the Commission; civil actions brought by the Commission; citizen actions brought against the Commission, a state, or county; appeals of Commission or county orders, regulations, and actions; and any civil penalties assessed by the Commission" (footnotes omitted)).

Broughton further contends that the district court had jurisdiction over its declaratory judgment action pursuant to 28 U.S.C. § 1331, the general federal question jurisdictional provision. This contention is without merit, as the jurisdictional provisions of the Gorge Act, 16 U.S.C. § 544m(b)(5)-(6), are more specific than section 1331's grant of jurisdiction. Therefore, the provisions of the Gorge Act are controlling. See Busic v. United States, 446 U.S. 398, 406 (1980).

[4] Because the federal district courts lack subject matter jurisdiction over Broughton's declaratory judgment action against the Commission, the district court properly dismissed this action.

III

Broughton appeals the district court's dismissal of its inverse condemnation action against the Commission, Broughton argues that the district court improperly dismissed its inverse condemnation action against the Commission

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Cong., 2d Sess. (1986); H.R. 5625, 99th Cong., 2d Sess. (1986).

because the States' waiver of immunity obviates the need for the ripeness requirement to be met and because the States' compensatory procedures for unconstitutional takings without just compensation are inadequate.

The basic rationale of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967), overruled on other grounds, Califano v. Sanders, 430 U.S. 99, 105 (1977). If a claim is not ripe for review, the federal courts lack subject matter jurisdiction and they must dismiss the claim. Southern Pac. Transp. Co. v. Los Angeles, 922 F.2d 498, 502 (9th Cir. 1990), cert. denied, 112 S.Ct. 382, 116 L.Ed.2d 333 (1991).

Constitutional challenges to local land use regulations are not considered by federal courts until they are "ripe" for federal adjudication. Id. at 502. Ripeness in an as-applied challenge to a local land use regulation requires the fulfillment of two prerequisites. First, the plaintiff must show that it has obtained a "'final and authoritative determination of the type and intensity of development legally permitted on the subject property.'" Id. (quoting MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 348 (1986)). Second, because the Constitution prohibits only takings without just compensation, "'if a State provides an adequate procedure for seeking just compensation,' plaintiffs may not bring as-applied claims to federal court until they have 'used the procedure and been denied just compensation.'" Id. at 503 (quoting Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 195 (1985)). Courts look to the time when the alleged taking without just compensation occurred to determine whether reasonable state procedures

were available. Southern Pacific Transp. Co., 922 F.2d at 504 (citations omitted).

Alternatively, a landowner who files suit in federal court before seeking compensation from the state "'bears the burden of establishing that state remedies are inadequate." Del Monte Dunes at Monterey v. Monterey, 920 F.2d 1496, 1506-07 (9th Cir. 1990) (quoting Austin v. Honolulu, 840 F.2d 678, 680 (9th Cir. 1988), cert. denied, 488 U.S. 852 (1988)).

[5] Broughton argues that the States' waiver of immunity obviates the need for the ripeness requirement to be met. Assuming arguendo that the States' waiver of sovereign immunity would obviate the need for the ripeness requirement to be met, Broughton's argument must fail because, as set forth above, the States have not waived their sovereign immunity. Furthermore, Broughton has not provided evidence sufficient to establish that either Oregon's or Washington's procedures were inadequate, nor has it demonstrated that the Gorge Act contravenes the state courts' power to award monetary damages if the appropriate criteria are satisfied.

Broughton does not dispute that both States provide compensation for regulatory takings.[6] Yet, Broughton failed to seek compensation from Oregon or Washington prior to filing this action in federal court.

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[6] See Presbytery of Seattle v. King County, 114 Wash.2d 320, 336 (1990), cert. denied, 111 S.Ct. 284, 112, L.Ed.2d 238 (1990); Fifth Avenue Corp. v. Washington County, 282 Or. 591, 614 (1978).

Because Broughton did not demonstrate the inadequacy of the States' compensatory procedures and because it failed to seek compensation from Oregon or Washington prior to filing its suit in federal court, Broughton has failed to satisfy the second prerequisite of the ripeness requirement.[7] Broughton's inverse condemnation action against the Commission is, therefore, unripe for judicial review and the district court properly dismissed this action.

AFFIRMED.

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[7] Because Broughton failed to satisfy the second prerequisite of the ripeness test, this court finds it unnecessary to examine the first prerequisite.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

BROUGHTON LUMBER CO., a Washington corporation,	)	
Plaintiff,	)	Civil No. 89-234-JU
v.	)	FINDINGS AND RECOMMENDATION
COLUMBIA RIVER GORGE COMMISSION,	)	[U.S. District Court of Oregon
Defendant.	)	Filed July 5, 1990]

JUBA, Magistrate:

INTRODUCTION

Plaintiff Broughton Lumber Company owns land in the Columbia Gorge Scenic Area. In August, 1988, plaintiff applied to the defendant Columbia River Gorge Commission for a permit to subdivide its land into three parcels for residential development. The Commission denied plaintiff's application and appeal. Plaintiff brought this action, seeking a declaratory judgment against the Commission to set aside its adverse decision and $250,000 for an unconstitutional taking of plaintiff's property.

Plaintiff brought this action against the Commission, Washington and Oregon, the Secretary of the United States Department of Agriculture, and the United States of America.

I have already granted the motions to dismiss of the federal defendants and the states. Findings and Recommendations (June 23, 1989) (docket #33) and (July 11, 1989) (docket #38). The Commission now moves to dismiss.

STANDARDS

The Commission moves to dismiss for lack of subject matter jurisdiction or, in the alternative, for failure to state a claim. Since the pleadings are closed, I assume the Commission makes its motion pursuant to Federal Rule of Civil Procedure 12(h) which provides that courts shall dismiss actions for lack of subject matter jurisdiction whenever the lack of jurisdiction becomes apparent. A motion to dismiss may also be proper under Rule 12(c) which provides for motions on the pleadings. Aldabe v. Aldabe, 616 F.2d 1089, 1093 (9th Cir. 1980) (holding motion to dismiss for failure to state a claim is proper under Rule 12(c) after pleadings closed).

DISCUSSION

Defendant contends this court does not have subject matter jurisdiction. The judicial review and jurisdictional sections of the Gorge Act state:

> (4) Judicial review
>
> Any person or entity adversely affected by -- (A) any final action or order of [] the Commission . . .
> ***
> (C) any appeal to the Commission pursuant to this section;

(D) . . . may appeal such action or order by filing in any of the courts specified in paragraph (5) of this subsection . . ..

(5) Federal court jurisdiction

The United States district courts located in the States of Oregon and Washington shall have jurisdiction over--
(A) any criminal penalty imposed pursuant to [the Act] . . .
(B) any civil action brought against the Secretary pursuant to [the Act] . . .
(C) any appeal of any order, regulation, or other action of the Secretary taken pursuant to [the Act] . . ..

(6) State court jurisdiction

The state courts of the States of Oregon and Washington shall have jurisdiction --
(A) to review any appeals taken to the Commission pursuant to [the Act] . . .
***
(C) over any appeal of any order, regulation, or other action of the Commission . . ..
*****

16 U.S.C. § 544m(b)(4)-(6).

Plaintiff argues because paragraph (4) places jurisdiction in "any of the courts specified in paragraph (5)," the federal courts paragraph, then plaintiff is properly before this court. Plaintiff's conclusion ignores the explicit plain

language in paragraph (5) providing federal court jurisdiction only for actions involving the Secretary. Plaintiff's conclusion also renders pointless paragraph (6) which provides state court jurisdiction for actions involving only the Commission or state government entities. I conclude that standing alone paragraph (4) is somewhat ambiguous; however, paragraphs (5) and (6) resolve that ambiguity clearly and in defendant's favor. This court does not have subject matter jurisdiction over plaintiff's appeal of the Commission's decisions.

Other authorities support my conclusion. Plaintiff seeks a declaratory judgment finding unlawful the Commission's refusal to allow plaintiff's proposed property division. A similar situation arose in Columbia Gorge United v. Yeutter, CV No. 88-1319-PA (May 23, 1990). Plaintiffs in Yeutter were landowners who sought permission from the Commission to develop their land within the Columbia Gorge Scenic Area. The Commission denied plaintiffs' requests and plaintiffs' appeals. Plaintiffs brought their action in this court. Judge Panner dismissed the action, stating in dicta that "[t]he Gorge Act and the Compact specify that jurisdiction over appeals or challenges to Commission or county action be placed in state courts, while providing jurisdiction to review action by the Secretary [of Agriculture] in federal district court. 16 U.S.C. § 544m(b)(4)-(6)." Id. at 30. Although the quoted passage from Yeutter is dicta, I accept it as persuasive authority.

In addition, commentary regarding the Act's judicial review and jurisdiction paragraphs unanimously conclude federal courts have jurisdiction only for actions involving the Secretary, leaving only state courts with jurisdiction to handle actions involving the Commission. See 132 Cong. Rec. S115, 645 (daily ed. Oct. 8, 1986) (statement of Sen. Gorton); Blair,

The Columbia River Gorge National Scenic Area: The Act, Its Genesis, and Legislative History, 17 Envtl. L. 863, 964 (1987).

Plaintiff also contends the Commission's decision effected an uncompensated taking of property for public use, violating plaintiff's fifth and fourteenth amendment rights. Plaintiff invokes federal question jurisdiction under 28 U.S.C. § 1331, contending this claim raises constitutional questions. Plaintiff is mistaken. Plaintiff bases its theory of a taking on the Commission's denial of plaintiff's land use application. To adjudicate this claim, I would have to serve as an appellate court and review plaintiff's application. As discussed above, that is a state court's job.

CONCLUSION

For the reasons stated above, defendant's motion to dismiss (#53) should be granted.

DATED this 5th day of July, 1990.

/s/ George E. Juba
United States Magistrate

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

BROUGHTON LUMBER CO., a Washington corporation,	)	
Plaintiff,	)	Civil No. 89-234-JU
v.	)	ORDER
COLUMBIA RIVER GORGE COMMISSION,	)	[U.S. District Court, District of Oregon Filed August 28, 1990]
Defendant.	)	

PANNER, J.:

Magistrate Juba filed his Findings and Recommendation on July 10, 1990. The matter is now before me pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). When either party objects to any portion of the Magistrate's Findings and Recommendation, the district court must make de novo determination of that portion of the Magistrate's report. 28 U.S.C. § (b)(1)(C); McDonnell Douglas Corp. v. Commodore Business Mach., Inc., 656 F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982).

Plaintiff has timely filed objections. I have therefore, given the file of this case a de novo review. I ADOPT the Magistrate's Findings and Recommendation granting defendant's motion to dismiss as to the first claim for declaratory judgment. I decline to adopt the Magistrate's

Findings and Recommendation as to the takings claim, and REMAND for briefing by the parties and further findings and recommendations from the Magistrate on the issue of abstention and related doctrines.

IT IS SO ORDERED.

DATED this 28th day of August, 1990.

/s/ Owen M. Panner
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

BROUGHTON LUMBER CO., a Washington corporation,	)	
Plaintiff,	)	Civil No. 89-234-JU
v.	)	ORDER
COLUMBIA RIVER GORGE COMMISSION,	)	[U.S. District Court District of Oregon Filed Dec. 13, 1990 Donald M. Cinnamond, Clerk]
Defendant.	)	

PANNER, J.

Magistrate Juba filed his Findings and Recommendation on October 11, 1990. The matter is now before me pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). When either party objects to any portion of the Magistrate's Findings and Recommendation, the district court must make de novo determination of that portion of the Magistrate's report. 28 U.S.C. § (b)(1)(C); McDonnell Douglas Corp. v. Commodore Business Mach., Inc., 656 F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982).

Plaintiff has timely filed objections. I have therefore, given the file of this case a de novo review. Though I ADOPT the Magistrate's Findings and Recommendation that

defendant's motion to dismiss be granted, I base my order on a different ground than that relied upon by Magistrate Juba.

Plaintiff Broughton Lumber Company owns land in the Columbia River Gorge National Scenic Area. In August, 1988, plaintiff applied to defendant Columbia River Gorge Commission ("the Commission"), for a permit to subdivide its land into three parcels for residential development. The Commission denied plaintiff's application and subsequent appeal. Plaintiff brought this action seeking a declaratory judgment that the Commission's adverse decision was invalid and $250,000 for an alleged unconstitutional taking of plaintiff's property.

I adopted Magistrate Juba's previous Findings and Recommendation granting the Commission's motion to dismiss the declaratory judgment claim because under the Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§ 544-544p, jurisdiction of that claim is in state court, not federal court. Broughton Lumber Co. v. Columbia River Gorge Comm'n, No. CV-89-234-JU (D. Or. Aug. 28, 1990). I remanded the takings claim for briefing by the parties and further findings and recommendations from the Magistrate on the issue of abstention and related doctrines. Id.

Magistrate Juba now recommends dismissal of the takings claim based on Younger abstention. Younger abstention is appropriate when there are (1) ongoing state proceedings which (2) implicate important state interests and where (3) there is an adequate opportunity to raise federal questions in the proceedings. World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079, 1082 (9th Cir. 1987) (discussing Younger v. Harris, 401 U.S. 37 (1971)).

"Younger abstention requires that the federal courts abstain when state court proceedings were ongoing at the time the federal action was filed." Beltran v. State of California, 871 F.2d 777, 782 (9th Cir. 1988) (emphasis added). Plaintiff has not filed an action in state court. The fact that it could does not constitute "ongoing" state proceedings. Abstention based on Younger is inappropriate in this case.

Nonetheless, I adopt the Magistrate's recommendation that defendant's motion to dismiss be granted because plaintiff's takings claim is unripe. If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed. Southern Pac. Transp. Co. v. City of Los Angeles, No. 89-55100, slip op. at 13878 (9th Cir. Nov. 9, 1990) (citing Shelter Creek Dev. Corp. v. City of Oxnard, 838 F.2d 375, 377 (9th Cir.), cert. denied, 109 S.Ct. 134 (1988)). This deficiency may be raised sua sponte if not raised by the parties. Id.

Claims for just compensation are not ripe for federal adjudication unless the plaintiff has sought compensation through any reasonable procedure provided by the state. Id. at 13882 (citing Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194-97 (1985)). As long as the state procedure conceivably allowed money damages for the takings claim when the alleged taking took place, plaintiff must pursue a state remedy before bringing the claim in federal court. Id.

Both Oregon and Washington allowed money damages in takings cases based on land-use regulation at the time this alleged taking took place. See, e.g., Presbytery of Seattle v. King County, 114 Wash. 2d 320, 336, 787 P.2d 907, cert. denied, 111 S.Ct. 284 (1990) (just compensation

mandated if a taking has occurred via a regulatory scheme) (citing Orion Corp. v. State of Washington, 109 Wash. 2d 621, 649, 747 P.2d 1062 (1987)); Fifth Avenue Corp. v. Washington County, 282 Or. 591, 614, 581 P.2d 50 (1978) (planning or zoning regulations which designate land for public use and preclude owner from all economically feasible private uses pending eventual taking for public use or result in such governmental intrusion as to inflict virtually irreversible damage, entitle owner to just compensation). Nothing in the Gorge Act suggests that it compromises a state court's power to award money damages if these respective criteria are met. Because plaintiff has not pursued a remedy in state court, the federal claim is unripe and must be dismissed.

CONCLUSION

I adopt the Magistrate's recommendation that the Commission's motion to dismiss be granted.

DATED this 13th day of December, 1990.

/s/ Owen M. Panner
United States District Court Judge

BEFORE THE
COLUMBIA RIVER GORGE COMMISSION

IN THE MATTER OF THE APPEAL OF BROUGHTON LUMBER COMPANY OF THE DENIAL BY THE DIRECTOR OF AN APPLICATION TO DIVIDE A 128.53 [SIC] ACRE TRACT INTO THREE PARCELS	)))))))))	FINDINGS OF FACT, CONCLUSIONS OF LAW, FINAL ORDER

1. The Columbia River Gorge Commission met on January 10, 1989, to consider the appeal of Broughton Lumber Company from a decision by the Director to deny a division of a 128.53 [sic] acre tract into three parcels.

2. The Commission held a contested case hearing on the appeal, pursuant to Commission rules 350-20-017 and 350-16-009 to 350-16-017. The Commission submitted as parties to the hearing the appellant, Skamania County and the Director.

3. At the conclusion of the hearing the Commission voted to uphold the denial of the division by the Director.

4. The Commission adopted as its findings of fact and conclusions of law those findings and conclusions contained in the Director's order, dated October 25, 1988.

ORDER

IT IS HEREBY ORDERED THAT:

1. The appeal of Broughton Lumber Company is denied. The decision of the Director is upheld.

2. The Commission adopts as its findings of fact and conclusions of law the finding and conclusion contained in the October 25, 1988, order of the Director attached to this order as Exhibit A.

DATED this 24th day of January, 1989.

FOR THE COMMISSION:

/s/ Stafford Hansell, Chairman

BEFORE THE
COLUMBIA RIVER GORGE COMMISSION

Development Review

APPLICANT: Broughton Lumber Co.

FILE NO.: C88-0125-S-G-12

REQUEST: To divide a 108.53 acre tax lot into three (3) parcels; two containing twenty acres and the third comprising the remaining acreage.

LOCATION: The subject tax lot is located South of and adjacent to the Cook-Underwood Road, within the N 1/2 of Section 29, Township 3 North, Range 10 East, W.M. (Tax Lot 100) within Skamania County, Washington.

NATIONAL SCENIC
AREA DESIGNATION: General Management Area

COMMENTS FROM OTHER AGENCIES/INDIVIDUALS:

In addition to property owners located 250 feet from the subject property boundaries, the following agencies/ individuals were mailed notice of the subject request:

OR Land Conservation and Development Commission
WA Department of Community Development
Yakima Indian Nation
Confederated Tribes of the Umatilla Indian Reservation

Confederated Tribes of Warm Springs
Nez Perce Tribe
U.S. Forest Service NSA Office
Skamania County Planning Department
WA Office of Archaeology and Historic Preservation
Underwood Community Council

Comments were received from:

1. Robert Lee, Skamania County Planning Department
2. WA Office of Archeology and Historic Preservation
3. Columbia Gorge United
4. Dr. Helen Paulus, Underwood, WA
5. Willis H. Bledsoe, Underwood, WA
6. USFS National Scenic Area Office

FINDINGS OF FACT:

A. Conversion of Land

1. Commission Rule 350-20-004(2)(b) defines forest lands as "those lands" which are used for growing forest products or are capable of producing in excess of twenty (20) cubic feet per acre per year of Douglas Fir, Ponderosa Pine and other merchantable tree species." The final interim guidelines Chapter III, Section C(1)(2)(a)(2) allows the conversion of forest land to agricultural land, recreational development or open space when consistent with the Act. Conversion to other uses is inconsistent with the Act.

Commission Rule 350-20-004(2)(a) defines agricultural lands as "those lands which are primarily used or suitable for the production of farm commodities including the growing of crops, fruits or Christmas trees or the pasturing, grazing or feeding of livestock. The Final Interim Guidelines, Chapter III, Section C(1)(a)(1) allows the conversion of agricultural land to open space, recreation development or forest land when consistent with the Act. Conversion to other uses is inconsistent with the Act.

2. The Columbia River Gorge National Scenic Area Act (Act), Section 6(d)(1), requires the Columbia River Gorge Commission (Commission) to "protect and enhance agricultural uses" and Section 6(1)(2) [sic] requires the Commission to protect and enhance forest land for forest use."

3. The subject tax lot (Tax Lot 100) is 108.53 acres in size. The total contiguous acreage under the applicant's ownership is 205.46 acres. This includes Tax Lot 200 within section 28 (35.46 acres) and Tax Lot 800 within Section 21C (61.47 acres).

   Section 4.0 of the Skamania County Short Plant Ordinance (Ordinance No. 1980-08) defines contiguous parcel as follows:

   Contiguous Parcel is land adjoining and touching other land not previously platted, and having the same owner, regardless of whether

or not portions of the parcels have separate tax lot numbers, or were purchased at different times, lie in different sections, different government lots or are separated from each other by public road or private rights-of-way.

4. Tax Lot 100 is characterized by a narrow bench along the Cook-Underwood Road which drops abruptly over the bluff towards the Columbia River and Washington State Route 14. This tax lot is vegetated with a mixture of coniferous and deciduous vegetation. The existing use of Tax Lots 200 and 800 is industrial. The Broughton Mill is located within these tax lots adjacent to State Route 14.

5. Adjacent land use to the west of the proposed land division is wooded bluff and cliff similar to that of the subject property. Adjacent land use to the north across the Cook-Underwood Road is orchard and vineyards. Rural residential land use exists approximately 1/4 mile to the east adjacent to the Cook-Underwood Road. Adjacent land use to the south is State Route 14 and railroad right-of-way.

6. The U.S.D.A. soil Conservation Service classifies the soils within Tax Lot 100 as Zerorthents-rock outcrop complex, 50-80% slopes. These soils have no forest land potential productivity.

7. Adjacent agricultural lands to the north are classified as Chemawa Loams by the S.C.S. These agricultural lands have been designated as prime and unique farmland soils.

8. Tax Lot 100 is classified and taxed by the Skamania County Assessor as timberland. Lands located to the north are classified by the County Assessor as agricultural land.

9. The Skamania County Comprehensive Plan designates the subject property as Rural 2. Bob Lee, Skamania County Planning Director, has determined that proposed development is considered with the County Plan.

Conclusion:

The proposed development would not represent a conversion of agriculture or forest land within the subject parcel.

Although the proposed development would not represent a conversion of the subject parcel, it would have an adverse, cumulative impact on agricultural lands located in the area. Section 2(a)(3) of the Act requires that proposed development be reviewed for cumulative impact. An approval of two (2) parcels and subsequent non-resource related, rural residential dwellings along the bluff adjacent to the Cook-Underwood Road would represent an incursion of non-farm dwellings into an area dominated by agricultural use. The mere presence of non-agricultural uses may interfere with agricultural activities on adjacent properties. The ensuing conflicts may discourage present and future agricultural activities and would not protect and enhance agricultural lands for agricultural uses as required by the Act and the Final Interim Guidelines.

B. Scenic Resources

1. The Act [Section 6(d)(8)] requires residential development outside the urban areas to occur "without adversely affecting the scenic . . . resources of the scenic area."

2. The Interim Guidelines, Chapter III, Section B(1)(2), state that "proposed uses or development shall not change the landscape setting of a site or its immediate surroundings from an undeveloped to rural or developed setting or from a rural to a developed setting."

   An "undeveloped setting," as defined by the Interim Guidelines, is "generally forest or grasslands of moderate to large size in a near natural condition. Structures or developed features other than roads are rare and isolated."

   A rural setting is "forest, range or agricultural land that is predominately vegetated, but which may have considerable evidence of human occupation such as structures, roads, and fields. Structures appear scattered or in small dominant clusters."

A "developed setting," as defined by the Final Interim Guidelines, exists where "residential, commercial, or industrial complexes are dominant in the landscape. Setting may include rural towns, large commercial or industrial developments, subdivisions, etc."

3. The applicant indicates in the project description that the proposed land division would provide two (2) building sites adjacent to the Cook-Underwood Road. This area can been [sic] seen from the Cook-Underwood Road, Washington State Route 14, the Columbia River, I-84 and the Burlington Northern and Union Pacific Railroads, all of which are identified as key viewing areas within the Final Interim Guidelines.

   The proposed residential development would occur along the bluff, on a flat located adjacent to the Cook-Underwood Road. This flat is approximately 100' wide at the western end and tapers to the east where it is approximately 80' wide. Near this point, the Cook-Underwood Road protrudes out to the cliff wall.

4. At the point where the Cook-Underwood Road intersects with the cliff, rural residential development ends. West of this point, the setting of the subject property, (where the two (2) homesites would occur), is undeveloped to rural. The area, immediately adjacent to the two proposed twenty acre parcels, is dominated by agricultural lands.

5. It may be possible to located [sic] a dwelling along the bluff without it protruding upon the skyline or without it detracting from or impairing views as seen from key viewing areas. There is approximately 100' of land between two [sic] bluff line and the county

road right-of-way. The location of a septic tank, drainfield and driveway along with each dwelling could have a major impact. A good percentage of the existing vegetation located on-site is deciduous. Without specific site and building plan information, it is difficult to determine whether a structure could be placed on-site and be consistent with Sections III B 1(3), (4), (5), (6), (7), (8) and (9) of the Final Interim Guidelines.

Conclusion:

The proposed development would adversely impact the scenic resources of the National Scenic Area. The proposed land division and subsequent rural residential development would change the landscape setting on the bluff from a rural to developed setting. The proposed development would also have a cumulative impact on the change of setting. Similar development extended along the bluff would represent an incursion of rural residential use into area dominated by rural, agricultural uses. The proposed development would not represent infill into the existing rural residential development located to the east.

The development would also encourage strip development along a bluff which is highly visible from several key viewing areas. While a single dwelling may be able to be sited consistent with the Act and Interim Guidelines, the cumulative impact of extending residential development along the bluff without adversely impairing or detracting from scenic views is questionable.

C. Cultural Resources

1. The existing inventories do not identify any archaeological, historical, or cultural resources on or near the proposed building area.

2. The WA Office of Archaeology of Historic Preservation commented on the subject development. They point out that the Broughton Flume is located in the project area and recommend that consideration be given to historic preservation concerns.

Conclusion:

The proposed land division does include the Broughton Flume. This structure is located over the bluff along the wall of the cliff. Residential development on the flat above the cliff would not involve or impact the flume.

D. Natural Resources

1. No threatened, rare and endangered plant or animal species have been identified on or in the vicinity in the subject area.

2. No known nature areas, endemic plant species or sensitive wildlife areas have been identified in the subject area.

3. No wetlands or streams are located on site or in the vicinity.

4. The land use pattern of the area is dominated by agricultural lands. The proposed rural

residential lots would introduce non-resource residential sites into the area. The Interim Guidelines, Chapter III B4(1) do not permit development which would "degrade or destroy the natural resources existing on a site proposed for development or cause off site impacts that could result, individually or cumulatively in the degradation or destruction of natural resources in the Scenic Area." The introduction of rural residential parcels into this area would not represent infill into an existing residential area.

Conclusion:

The proposed development would be a precursor of non-resource, rural residential development into agricultural lands.

DECISION:

Based upon the preceding findings of fact, the land use application by Broughton Lumber Co. to create two (2) twenty (20) acre parcels is hereby denied.

DATED AND SIGNED THIS 25th day of October, 1988 at White Salmon, Washington.

/s/ Richard P. Benner, Executive Director

Note: When a proposed action is disapproved by the Executive Director, and the Commission does not approve the development on appeal, no new application for the same or substantially similar action shall be filed for twelve (12) months from the date of the decision disapproving the action.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BROUGHTON LUMBER CO.,	)	No. 91-35183
Plaintiff-Appellant,	)	D.C. No. CV-89-234-JU
v.	)	
	)	ORDER DENYING PETITION FOR REHEARING
COLUMBIA RIVER GORGE COMMISSION, et al.,	)	[U.S. Court of Appeals Filed Jan. 22, 1993 Cathy A. Catterson, Clerk]
Defendants-Appellees	)	

Appeal from the United States District Court
for the District of Oregon

Before: WALLACE, Chief Judge, GOODWIN, Circuit Judge, and CROCKER[1], District Judge

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

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[1] Honorable M.D. Crocker, United States District Judge, Eastern District of California, sitting by designation

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

BROUGHTON LUMBER CO.	)	
Plaintiff,	)	Civil No. 89-234-JU
v.	)	JUDGMENT
COLUMBIA RIVER GORGE COMMISSION,	)	[U.S. District Court, District of Oregon Filed Dec. 17, 1990 Donald M. Cinnamond, Clerk]
Defendant.	)	

Based on the record,

IT IS ORDERED AND ADJUDGED this action is dismissed.

DATED: December 17, 1990.

PERTINENT PROVISIONS FROM THE COLUMBIA RIVER GORGE NATIONAL SCENIC AREA ACT (16 U.S.C. 544-544p)

16 U.S.C. 544a

The purposes of this Act are --

1. to establish a national scenic area to protect and provide for the enhancement of the scenic, cultural, recreational, and natural resources of the Columbia River Gorge; and

2. to protect and support the economy of the Columbia River Gorge area by encouraging growth to occur in existing urban areas and by allowing future economic development in a manner that is consistent with paragraph (1).

* * * * *

16 U.S.C. 544b

(a) Establishment and Membership of the Commission -- (1) To achieve the purposes of this Act and to facilitate cooperation among the States of Oregon and Washington, and with the United States of America, the consent of Congress is given for an agreement described in this Act pursuant to which, within one year after the date of enactment of this Act --

(A) the States of Oregon and Washington shall establish by way of an interstate agreement a regional agency known as the Columbia River Gorge

Commission, and shall incorporate this Act by specific reference in such agreement. The Commission shall carry out its functions and responsibilities in accordance with the provisions of the interstate agreement and of this Act and shall not be considered an agency or instrumentality of the United States for the purpose of any Federal law.

(B) the States of Oregon and Washington shall provide to the Commission, State agencies, and the counties under State law the authority to carry out their respective functions and responsibilities in accordance with the provisions of paragraph (1)(A) of this subsection;

* * *

16 U.S.C. 544d

(a) Studies -- Within one year after the date the Commission is established, it shall, in cooperation with the Secretary, complete the following studies for use in preparing the management plan:

(1) Resource Inventory -- The Commission shall complete a resource inventory. The resource inventory shall --

(A) document all existing land uses, natural features and limitations, scenic, natural, cultural, archaeological and recreation and economic resources and activities: Provided, that the location of any Indian burial grounds, village sites and other areas of archaeological or religious significance shall not be made

public information and such information shall be used for administrative purposes only; and

(B) incorporate without change the resource inventory developed by the Secretary pursuant to section 8 of this Act for the special management areas.

* * *

(b) Land Use Designations -- Within two years after the Commission is established, it shall develop land use designations for the use of non-Federal lands within the scenic area. The land use designations shall --

(1) be based on the results of the resource inventory developed pursuant to subsection (a)(1) of this section, and consistent with the standards established in subsection (d) of this section;

(2) designate those lands used or suitable for the production of crops, fruits or other agricultural products or the sustenance of livestock as agricultural lands;

(3) designate lands used or suitable for the production of forest products as forest lands;

(4) designate lands suitable for the protection and enhancement of open spaces;

(5) designate areas in the scenic area outside special management areas used or suitable for commercial development: Provided, that such designation shall encourage, but not require,

commercial development to take place in urban areas and shall take into account the physical characteristics of the areas in question and their geographic proximity to transportation, commercial, and industrial facilities and other amenities;

(6) designate areas used or suitable for residential development, taking into account the physical characteristics of the areas in question and their geographic proximity to transportation and commercial facilities and other amenities; and

(7) incorporate without change the designation of urban areas established in section 4(e) of this Act.

(c) Adoption of the Management Plan -- Within three years after the date the Commission is established, it shall adopt a management plan for the scenic area. The Commission shall adopt the management plan by a majority vote of the members appointed, including at least three members from each State. The management plan shall--

(1) be based on the results of the resource inventory developed pursuant to subsection (a)(1) of this section;

(2) include land use designations developed pursuant to subsection (b) of this section;

(3) be consistent with the standards established in subsection (d) of this section;

(4) incorporate without change the management direction for the use of Federal lands

within and the land use designations for the special management areas adopted by the Secretary pursuant to section 8 of this Act; and

(5) include guidelines for the adoption of land use ordinances for lands within the scenic area. The guidelines --

(A) shall incorporate without change the guidelines for the development of special management area land use ordinances developed by the Secretary pursuant to section 8 of this Act; and

(B) shall not apply to urban areas designated in section 4(e) of this Act.

(d) Standards for the Management Plan -- The Management plan and all land use ordinances and interim guidelines adopted pursuant to this Act shall include provisions to --

(1) protect and enhance agricultural uses and to allow, but not require, conversion of agricultural lands to open space, recreation development or forest lands;

(2) protect and enhance forest lands for forest uses and to allow, but not require, conversion of forest lands to agricultural lands, recreation development or open spaces;

(3) protect and enhance open spaces;

(4) protect and enhance public and private recreation resources and educational and interpretive facilities and opportunities, in accordance with the recreation assessment adopted pursuant to subsection (a) of this section;

(5) prohibit major development actions in special management areas, except for partitions or short plats which the Secretary determines are desirable to facilitate land acquisitions pursuant to this Act;

(6) prohibit industrial development in the scenic area outside urban areas;

(7) require that commercial development outside urban areas take place without adversely affecting the scenic, cultural, recreation, or natural resources of the scenic area;

(8) require that residential development outside urban areas take place without adversely affecting the scenic, cultural, recreation, and natural resources of the scenic area; and

(9) require that the exploration, development and production of mineral resources, and the reclamation of lands thereafter, take place without adversely affecting the scenic, cultural, recreation and natural resources of the scenic area.

* * * * *

16 U.S.C. 544f

(a) Management of the Scenic Area -- The non-Federal lands within the scenic area shall be administered by the Commission in accordance with the management plan and this Act.

(b) Adoption of Scenic Area Land Use Ordinances --

(1) Within sixty days of initial receipt of the management plan, each county shall submit to the Commission a letter stating that it proposes to adopt a land use ordinance consistent with the management plan. If any county fails to submit such letter or fails to adopt a land use ordinance as provided in this section the Commission shall carry out the requirements of subsection (c) of this section.

* * *

(c) Commission Land Use Ordinances -- (1) Within ninety days after making a determination that a county has failed to comply with the provisions of this section, the Commission shall make and publish a land use ordinance setting standard [sic] for the use of non-Federal lands in such county within the boundaries of the national scenic area, excluding urban areas identified in section 4(e) of this Act. The ordinance shall have the object of assuring that the use of such non-Federal lands is consistent with the management plan. The ordinance may differ among the several parcels of land within the boundaries of the scenic area. The ordinance may from time to time be amended by the Commission.

* * * * *

16 U.S.C. 544e

(a) Administration of Federal Lands -- (1) The Secretary shall administer Federal lands within the special management areas in accordance with this Act and other laws, rules and regulations applicable to the national forest system. In addition, the construction of roads and the management, utilization and harvest of timber on Federal lands within the special management areas also shall be subject to Forest Service visual resource management guidelines. The Secretary shall utilize lands acquired through exchange in calculating the allowable sales quantity on the Gifford Pinchot and Mount Hood National Forests.

* * *

(c) Resource Inventory -- The Secretary shall complete a resource inventory for the special management areas consistent with the process and substance of the inventory prescribed by section 6(a)(1) of this Act.

* * *

(f) Guidelines for Land Use Ordinances -- (1) Within three years after the date of enactment of this Act, the Secretary shall, in consultation with the Commission, develop guidelines to assure that non-Federal lands within the special management areas are managed consistent with the standards in section 6 and the purposes of this Act. The Secretary shall promptly transmit the guidelines to the Commission for inclusion in the management plan. The guidelines shall require that management, utilization, and disposal of timber, and exploration, development, and

production of sand, gravel, and crushed rock for the construction, maintenance, or reconstruction of roads used to manage or harvest forest products on non-Federal lands within the special management areas take place without adversely affecting the scenic, cultural, recreation, and natural resources of the scenic area.

* * *

(h) Adoption of Special Management Area Land Use Ordinances -- (1) Within sixty days of receipt of the management plan, each county shall submit to the Commission a letter stating that it proposes to adopt a land use ordinance consistent with the management plan. If any county fails to submit a letter as provided in this subsection, or fails to adopt a land use ordinance as provided in this section, the Commission shall carry out the requirements of subsection (l) of this section.

* * *

(l) Commission Ordinances -- (1) Within ninety days after making a determination that a county has failed to comply with the provisions of subsection (h) of this section, the Commission shall make and publish an ordinance setting standards for the use of non-Federal lands in such county within the boundaries of the special management areas. The ordinances shall have the object of assuring that the use of such lands is consistent with the management plan. The ordinances may differ amongst the several parcels of land within the boundaries of the special management areas. The ordinances may from time to time be amended by the Commission.

* * * * *

16 U.S.C. 544l

(1) Within one hundred and eighty days after the date of enactment of this Act, the Secretary shall develop interim guidelines for the scenic area outside urban areas to identify land use activities which are inconsistent with this Act and to govern the authority to acquire land without the consent of the owner provided by subsection (b) of this section. The Secretary shall promptly notify the public of adoption of the interim guidelines and transmit the guidelines to each county. Guidelines adopted by the Secretary pursuant to this subsection shall remain in effect for each county until the Secretary has developed guidelines for the special management areas pursuant to section 8 of this Act and the land use ordinances prescribe in section 7 are in effect.

* * * *

16 U.S.C. 544m

(a) Administrative Remedies --

(1) Commission Orders -- The Commission shall monitor activities of counties pursuant to this Act and shall take such actions as it determines are necessary to ensure compliance.

(2) Appeal to the Commission -- Any person or entity adversely affected by any final action or order of a county relating to the implementation of this Act may appeal such action or order to the Commission by filing with the Commission within thirty days of such action or order, a written petition requesting that such action or order be modified, terminated, or set aside.

(3) Civil Penalties -- Any person or entity who willfully violates the management plan or any land use ordinance or any implementation measure or any order issued by the Commission pursuant to this Act may be assessed a civil penalty by the Commission not to exceed $10,000 for each violation. No penalty may be assessed under this subsection unless such person or entity is given notice and opportunity for a public hearing with respect to such violation. The Commission may compromise, modify, or remit, with or without conditions, any penalty imposed under this subsection, taking into consideration the nature and seriousness of the violation and the efforts of the violator to remedy the violation in a timely manner.

(b) Judicial Remedies --

(1) Civil Actions to Enforce Act --

(A) Except as otherwise limited by this Act, the Attorney General of the United States may, at the request of the Secretary, institute a civil action for an injunction or other appropriate order to prevent any person or entity from utilizing lands within the special management areas in violation of the provisions of this Act, interim guideline adopted or other action taken by the Secretary pursuant to this Act.

(B) The Commission, or, at the request of the Commission, or the attorney general of Oregon or Washington, may institute a civil action for an injunction or other

appropriate order to prevent any person or entity from utilizing lands within the scenic area outside urban areas in violation of the provisions of this Act, the management plan, or any land use ordinance or interim guideline adopted or other action taken by the Commission or any county pursuant to this Act.

(2) Citizens Suits -- Any person or entity adversely affected may commence a civil action to compel compliance with this Act --

(A) against the Secretary, the Commission or any county where there is alleged a violation of this Act, the management plan or any land use ordinance or interim guideline adopted or other action taken by the Secretary, the Commission, or any county pursuant to or Commission under this Act; or

(B) against the Secretary, the Commission, or any county where there is alleged a failure of the Secretary, the Commission or any county, to perform any act or duty under this Act which is not discretionary with the Secretary, the Commission or any county.

(3) Limitation on Bringing of Citizens Suits -- No action may be commenced --

(A) under paragraph (2)(A) of this subsection --

(i) prior to sixty days after the plaintiff has given notice in writing of the alleged violation to the Secretary, to the Commission, and to the county in which the violation is alleged to have occurred; or

(ii) if the Attorney General of the United States, or the attorney general of Oregon or Washington, has commenced and is diligently prosecuting a civil action on the same matter pursuant to paragraph (1) of this subsection to require compliance with the management plan or any regulations, guidelines, or standards issued or other actions taken by the Secretary, the Commission, or any county pursuant to this Act; Provided, That in any such action any person or entity otherwise entitled to bring an action pursuant to paragraph (2) of this subsection may intervene as a matter of right; or

(iii) which challenges the consistency of the draft management plan with the purposes and standards of this Act or with other applicable law prior to the certification or adoption of the Management Plan pursuant to section 6 of this Act; or

(B) under paragraph (2) (B) of this subsection prior to sixty days after the plaintiff has given notice in writing of such action to the Secretary, the Commission, and to the county in which the failure to perform any act or duty pursuant to this Act is alleged: Provided, That such action may be brought immediately after such notification where the violation or order complained of constitutes an imminent threat to the health or safety of the plaintiff or would immediately affect a legal interest of the plaintiff.

(4) Judicial Review -- Any person or entity adversely affected by --

(A) any final action or order of a county, the Commission, or the Secretary relating to the implementation of this Act;

(B) any land use ordinance or interim guideline adopted pursuant to this Act;

(C) any appeal to the Commission pursuant to this section;

(D) any civil penalty assessed by the Commission pursuant to paragraph (a)(3) of this subsection may appeal such action or order by filing in any of the courts specified in paragraph (5) of this subsection, within sixty days after the date of service of such order or within sixty days after such action is taken, a written petition requesting such action, order, land use ordinance, interim guideline, or appeal taken to the Commission be modified, terminated, or set aside.

(5) Federal Court Jurisdiction -- the United States district courts located in the States of Oregon and Washington shall have jurisdiction over --

(A) any criminal penalty imposed pursuant to 16 U.S.C. 551, or any other applicable law for violation of any order, regulation or other action taken by the Secretary pursuant to this Act;

(B) any civil action brought against the Secretary pursuant to this section; or

(C) any appeal of any order, regulation, or other action of the Secretary taken pursuant to paragraph (4) of this subsection.

(6) State Court Jurisdiction -- The State courts of the States of Oregon and Washington shall have jurisdiction.

(A) to review any appeals taken to the Commission pursuant to subsection (a)(2) of this section;

(B) over any civil action brought by the Commission pursuant to subsection (b)(1) of this section or against the Commission, a State, or a county pursuant to subsection (b)(2) of this section;

(C) over any appeal of any order, regulation, or other action of the Commission or a county taken pursuant to paragraph 4 of this subsection; or

(D) any civil penalties assessed by the Commission pursuant to subsection (a)(3) of this section.

PERTINENT PROVISIONS OF OREGON'S COMPACT IMPLEMENTING STATUTE[1]

196.150 Compact provisions. The Legislative Assembly of the State of Oregon hereby ratifies the Columbia River Gorge Compact set forth below, and the provisions of such compact hereby are declared to be the law of this state upon such compact becoming effective as provided in Article III.

* * * * *

ARTICLE I

Columbia Gorge Commission Established

a. The States of Oregon and Washington establish by way of this interstate compact a regional agency known as the Columbia River Gorge Commission.

* * *

e. Funds necessary to fulfill the powers and duties imposed upon and entrusted to the commission shall be provided as appropriated by the legislatures of the states in accordance with Article IV.

* * * * *

ARTICLE IV

---

[1] Washington's implementing statute is identical and may be found at Wash. Rev. Code 43.97.015, et seq.

Funding

a. The States of Washington and Oregon hereby agree to provide by separate agreement or statute of each state for funding necessary to effectuate the commission, including the establishment of compensation or expenses of commission members from each state which shall be paid by the state of origin.

* * *

c. Subject to appropriation by their respective legislatures, the commission shall be provided with such funds by each of the party states as are necessary to provide the means of establishing and maintaining facilities, a staff of personnel, and such activities as may be necessary to fulfill the powers and duties imposed upon and entrusted to the commission.

* * *

d. The commission's proposed budget and expenditures shall be apportioned equally between the states.

* * * * *

196.155 Authority for state officers and agencies to carry out duties under compact. The Governor, the Columbia River Gorge Commission and all state agencies and counties are hereby directed and provided authority to carry out their respective functions and responsibilities in accordance with the compact executed under ORS 196.150 to 196.165 and the Columbia River Gorge National Scenic Area Act. [Formerly 390.505]

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92-1772

No.

Supreme Court, U.S.
FILED
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

BROUGHTON LUMBER CO.,

Petitioner,

v.

COLUMBIA RIVER GORGE COMMISSION, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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August 1993

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33 pp

QUESTION PRESENTED

Do the jurisdictional provisions of the Columbia River Gorge National Scenic Area Act, 16 U.S.C. § 544m(b)(4)-(6), confer federal subject matter jurisdiction over the Columbia River Gorge Commission for review of a land use decision it has made?

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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1992

BROUGHTON LUMBER CO.,

Petitioner,

v.

COLUMBIA RIVER GORGE
COMMISSION, et al.,

Respondents.

On Petition for Writ
of Certiorari to the Ninth Circuit
Court of Appeals

The respondent Columbia River Gorge Commission respectfully requests that this Court deny the petition for writ of certiorari seeking review of the judgment and opinion of the Ninth Circuit in this case. That opinion is reported at 975 F.2d 616 (1992).

STATEMENT OF THE CASE

I. The Development of Federal and State Legislation

The Columbia River Gorge is a remarkable constellation of natural resources with great significance. The Columbia River forms the boundary between Oregon and Washington for a portion of its length and is the largest river in the country that flows into the Pacific Ocean.[1] Efforts to manage the Columbia River Gorge date back to 1893 when Congress created the Cascade Range Forest Reserve which later became the Mount Hood National Forest. In 1937, the Pacific Northwest Regional Planning

---

[1]The explorers Lewis and Clark described with awe the area's monumental rock formations and scenic beauty during their famous expedition through the Gorge in 1805. 99 Congr. Rec., H 11121 (Oct. 16, 1986). A more recent observer aptly summarized the special nature of the area:

> The beauty of this spectacular canyon is breathtaking. Waterfalls cling to the mountainsides. Giant cliffs and rocks stand out as sentinels against the wind and rain. The great Columbia River moves silently and smoothly toward its destined meeting with the Pacific Ocean. The peaks of Mount St. Helens, Mount Adams, and Mount Hood loom as reminders of the fiery prehistoric past.

Senator Daniel Evans, 99 Congr. Rec., S 15642 (Oct. 8, 1986).

Commission considered creating an interstate park in recognition of the Gorge's national importance. During the 1950's, both Oregon and Washington created separate Gorge Commissions but they were ineffective due to lack of funding as well as opposition by special interest groups.

In the past decade, elected officials in the Northwest sought a comprehensive approach to protecting the Gorge as a region. Congressional leaders and the Governors of Oregon and Washington reached agreement on the need for federal legislation to assist the states' efforts to protect the area.

In the beginning, proposals ranged from complete federal regulation of land use in the Gorge to bi-state control with limited involvement from the national government. During the extensive debate on these options between 1982 and 1986, federal and state officials considered the views of Gorge residents and other interested citizens. Over time, support developed for a partnership with participation by federal, state and local agencies. Blair, *The Columbia River Gorge National Scenic Area: The Act, Its Genesis*

and Legislative History, 17 ENVTL. L. 863 (1987). From this consensus, after years of negotiations, the Columbia River Gorge National Scenic Area Act was created. 16 U.S.C. § 544, *et seq.* (1986). Congress approved the Scenic Act on October 17, 1986. President Reagan signed it on November 17, 1986.

II. The Structure of the Columbia River Gorge National Scenic Area Act

A. Overview

Congress determined the purposes of the Scenic Act are two-fold: first, "to establish a national scenic area to protect and provide for the enhancement of the scenic, cultural, recreational and natural resources of the Gorge"; second, to protect and support the economy of the Gorge "by encouraging growth to occur in existing urban areas and by allowing future economic development in a manner that is consistent with" the first purpose. § 544a. To accomplish these objectives, the Scenic Act has three main features. First, it designates a specific portion of the

Columbia River Gorge as a National Scenic Area[2] and divides the region into three categories: (1) urban areas, the regulation of which is exempt under the Act; (2) special management areas; and (3) the remainder, referred to as general management areas. § 544b.[3]

Second, the Scenic Act contains the advance consent of Congress to the Columbia River Gorge Compact between Oregon and Washington to establish a regional agency, the Columbia River Gorge Commission, with regulatory authority over resources and land use within the Scenic Area. § 544c. As a condition to its consent, Congress required, inter alia, that the states vest in the Gorge Commission the powers necessary to implement the Act and

---

[2]The Scenic Area lies to the east of Portland, Oregon and Vancouver, Washington. It extends 80 miles along the Columbia River, stretching from the Sandy River on the west to the Deschutes on the east. The Scenic Area covers portions of six counties: Clark, Skamania and Klickitat in Washington, and Multnomah, Hood River and Wasco in Oregon.

[3]The urban areas include 13,000 acres, the special management areas 112,000 acres and the general management areas 113,000 acres. 99 Congr. Rec., H 10485 (Oct. 16, 1986).

that the Commission carry out its duties in accordance with the terms of the Act. *Id.*[4]

Third, the Scenic Act directed the Secretary of Agriculture to carry out planning functions in close cooperation with the Gorge Commission and to adopt interim guidelines for the Scenic Area which identify land use activities inconsistent with the Act. § 544h. The guidelines apply until land use ordinances are adopted in each county.

---

[4]Congress may condition consent to a compact with specific requirements. Seattle Master Builders v. Pacific N.W. Elec. Power, 786 F.2d 1359, 1364 (9th Cir. 1986), cert. denied, 479 U.S. 1059, 107 S. Ct. 939, 93 L.Ed. 2d 989 (1987). The Compact Clause of the Constitution, Art. I, § 10, cl. 3, provides an "important device for fashioning new instruments adopted to new strategies." Frankfurter & Landis, *The Compact Clause of the Constitution -- A Study in Interstate Adjustments*, 34 Yale L.J. 685, 688 (1925). As the Ninth Circuit declared in upholding the constitutionality of the Columbia River Gorge National Scenic Area Act: "The Columbia River Gorge Compact is just such an innovative solution to a difficult interstate land preservation problem." Columbia River Gorge United v. Yeutter, 960 F.2d 110 (9th Cir. 1992) cert. denied sub nom. Columbia Gorge United v. Madigan, 121 L.Ed. 2d 128 (1992).

B. The Columbia River Gorge Commission

The Scenic Act specifies the composition of the Gorge Commission with three members appointed by the Governor of each state and one member appointed by each of the six counties. § 544c(a) The Secretary of Agriculture is designated a non-voting member of the Commission. § 544c(a)(C)(iv)

The Act required the Gorge Commission to complete several studies and create land use designations for a plan governing all development activities in the Gorge. § 544d The plan must include designations and guidelines developed by the Secretary for specific areas of the Gorge where the federal government is the largest landowner. § 544d(c)

The Act directed the Gorge Commission to review all proposed development during the interim period prior to adoption of the plan. § 544h(c) Development shall be approved only if it is consistent with the Act and with the interim guidelines adopted by the Secretary. Id.

C. County Zoning Ordinances

Once the Gorge Commission adopts the plan, the Act authorizes each county to adopt a land use ordinance consistent with it. § 544e(b) If a county does not adopt an ordinance, the Commission must do so instead. § 544e(c)

III. The Columbia River Gorge Compact

In 1987, Oregon and Washington enacted legislation adopting the Scenic Act in the Columbia River Gorge Compact. Or. Rev. Stat. § 196.150; Wash. Rev. Code § 43.97.020. During May and June of 1987, the Governors of both states and the counties in the Scenic Area appointed the members of the Gorge Commission. The Compact delegates to the Commission the authority to carry out the duties defined in the Act.

IV. Procedural Background And Facts

Petitioner, Broughton Lumber Company, owns a 108.53-acre parcel of property in Skamania County, Washington within the National Scenic Area. Petitioner submitted an application to the Gorge Commission in 1988 to divide the property into three

sections for residential development outside of an urban area. The director of the agency denied the application. A-48 Petitioner appealed and the Gorge Commission upheld the decision. A-46 Since the case arose in the interim period prior to the adoption of ordinances based on the plan, the Gorge Commission applied the provisions of the Act and guidelines as well as its rules in making the decision.[5]

Petitioner filed a complaint in the U.S. District Court for the District of Oregon against the Gorge Commission, the states of Oregon and Washington and the United States.[6] The District

---

[5]An ordinance that implements the Scenic Act will take effect in Skamania County, where the property is located, in the near future. The interim guidelines and the rules of the agency will no longer apply to petitioner's future development activities. For this reason, the claim made here is largely moot. Contrary to petitioners assertion, it has never been established that the interim guidelines deprive "many landowners of all economically viable use of their property." (Petition, 10) In addition, the Gorge Commission subsequently approved petitioners proposal for a commercial resort on the same property that is the subject of this case on April 10, 1990.

[6]The procedural background is taken from the Ninth Circuit's decision, Broughton Lumber Company v. Columbia River Gorge Commission, 975 F.2d 616, 618 (1992).

Court dismissed the inverse condemnation claim against the states and the United States. The District Court dismissed petitioner's declaratory judgment claim against the Gorge Commission for lack of subject matter jurisdiction. The District Court also dismissed petitioner's taking claim against the Gorge Commission because it was not ripe for judicial review. Petitioner failed to obtain a final decision in regard to use of the property or utilize the procedures provided for by the states for just compensation.

Petitioner appealed and the Ninth Circuit Court of Appeals affirmed.[7] Broughton Lumber Company v. Columbia River Gorge Commission, 975 F.2d 616 (1992) Petitioner now seeks review in the Supreme Court of dismissal of the declaratory judgment claim against the Gorge Commission for lack of subject matter jurisdiction rather than the taking . (Petition, 14-24).[8]

---

[7]Petitioner did not appeal the District Court's dismissal of the United States or the Secretary of Agriculture to the Ninth Circuit.

[8]Petitioner did not seek review in this Court of the Ninth Circuit's affirmance of the dismissal of Washington and Oregon on Eleventh Amendment grounds.

In the declaratory judgment claim in the District Court, petitioner merely alleged the Gorge Commission

> "erred in denying plaintiff's application in one or more of the following particulars:
>
> a. in erroneously interpreting and applying the standards in the Gorge Act and the regulations promulgated thereunder;
>
> b. in issuing an order not supported by substantial evidence; and
>
> c. by considering evidence not in the record.
>
> The Commission's action adversely affects plaintiff and is contrary to law. Pursuant to 16 U.S.C. § 544 m(b)(4), a declaratory judgment should issue setting aside and terminating the Commission's action as invalid." SUPP A 3-4.

Contrary to petitioner's assertion in this Court, it did not allege the Gorge Commission's decision "violated both the express conditions Congress placed on the interstate compact and the regulations promulgated under the compact." (Petition, 11) SUPP A 3-4. Nor did petitioner allege any "express conditions" of Congress or "regulations promulgated" under the Compact that were violated. Petitioner's only claim was that the Gorge

Commission erred in denial of the proposed land division and development.

REASONS WHY THE PETITION SHOULD BE DENIED

This case presents an ordinary claim for review of a land use decision. Petitioner seeks to challenge the standards and evidence considered by the Gorge Commission in its denial of a permit for development through a declaratory judgment claim. Thus, while the petition in this Court is framed in terms of a far-reaching principle concerning interstate compacts, the heart of the case is simply a request for review of a land use decision.[9]

Contrary to petitioner's assertion, the declaratory judgment claim did not make any allegations even suggesting "the federal government and a bi-state Commission have displaced six counties as the regulators of all land use" in the Gorge or that the Gorge Commission has "far reaching zoning authority but no power to compensate private landowners for regulatory takings." (Petition

---

[9] As the U.S. Magistrate found in this case: "Plaintiff seeks a declaratory judgment finding unlawful the Commission's refusal to allow plaintiffs proposed property division." A-38

5,6) In fact, a regulatory taking claim was never alleged in the declaratory judgement pleadings and the dismissal of the taking claim is not the object of the petition for review in this Court. A 3-4.

In addition, petitioner's assertion that "disputes regarding compact agencies' authority must be subject to federal judicial review" is without foundation in the record. (Petition, 7) The declaratory judgment claim did not allege any such dispute, the necessity for federal judicial review or, contrary to petitioner's contention now, any prospect for "conflicting and potentially irreconcilable directives of the courts of the participating states." (Petition, 8)

The crux of this case is why jurisdiction over appeals or challenges to decisions of the Gorge Commission relating to land use development lie in state court under the specific provisions of the Scenic Act. At no point was the District Court or the Ninth Circuit required to address some alleged flaw in the Scenic Act or

the Columbia River Gorge Compact because "citizens will be left without meaningful judicial review and remedies." (Petition, 14)

The Scenic Act expressly provides for jurisdiction over an appeal or challenge to an action of the Gorge Commission in state court. The Ninth Circuit correctly concluded jurisdiction is in state court. Moreover, petitioner has never demonstrated why jurisdiction for review of a land use decision in state court is not adequate.

Petitioner's position eviscerates the role of the states in review of land use decisions regarding its citizens. First, it is contrary to the states's purposes and the provisions of the Scenic Act and the Compact. Second, it contravenes basic principles of property law. Property law has traditionally been defined by existing rules that stem from an independent source such as state law. See Board of Regents v. Roth, 408 U.S. 564, 577 (1971).

Petitioner also fails to show why this case is of sufficient importance to merit this Court's review. The declaratory judgment

claim did not raise any seminal issues relating to interstate compact law that justify granting the petition for certiorari.

Petitioner has not demonstrated the Ninth Circuit's analysis conflicts with any other circuit. Nor does petitioner demonstrate that the decision is inconsistent with this Court's recent decisions such that the Court should grant certiorari as a function of its supervisory powers over the lower federal courts. In any event, petitioner fails to demonstrate this case involves a substantial federal question.

I. The Provision In The Columbia River Gorge National Scenic Act That Jurisdiction For Review Of A Land Use Decision Is In State Court Does Not Present A Question That Merits Review By This Court

The language of the Scenic Act expressly provides for jurisdiction over appeals from land use decisions of the Gorge Commission in state court. The judicial review and jurisdiction sections of the Act state:

> Judicial remedies.
>
> ***
>
> (4) Judicial review

Any person or entity adversely affected by--
(A) any final action or order of a county, the Commission, or the Secretary relating to the implementation of the Act;
(B) any land use ordinance or interim guideline adopted pursuant to this Act;
(C) any appeal to the Commission pursuant to this section;
(D) any civil penalty assessed by the Commission pursuant to paragraph (a)(3) of this subsection may appeal such action or order by filing in any of the courts specified in paragraph (5) of this subsection, within sixty days after the date of service of such order or within sixty days after such action is taken, a written petition requesting such action, order, land use ordinance, interim guideline, or appeal taken to the Commission be modified, terminated, or set aside.

(5) Federal court jurisdiction

The United States district courts located in the State of Oregon and Washington shall have jurisdiction over--
(A) any criminal penalty imposed pursuant to [the Act] ...
(B) any civil action brought against the Secretary pursuant to [the Act] ...
(C) any appeal of any order, regulation or other action of the Secretary taken pursuant to [the Act] ...

(6) State court jurisdiction

The state courts of the States of Oregon and Washington shall have jurisdiction--

> (A) to review any appeals taken to the Commission pursuant to [the Act] ...
> ***
> (C) over any appeal of any order, regulation, or other action of the Commission ...
> ***

16 U.S.C. § 544m(b) (4-6).

A literal construction of the Scenic Act is required. Green v. Biddle, 8 Wheat. 1, 88 (1823) (interstate compact for claims to land). The express terms of the legislation control its interpretation and a court may not order relief inconsistent with the language used. Texas v. New Mexico, 462 U.S. 554, 564 (1983) (interstate compact for allocation of water). Since the Scenic Act provides for judicial review of an appeal or challenge to decisions of the Gorge Commission in state court, this case does not present any issue that merits review by this Court.

Petitioner contends that because paragraph (4) of the judicial remedies section of the Scenic Act places jurisdiction in "any of the courts specified in paragraph (5)", there is jurisdiction in federal court to review the agency's decision. This position ignores the plain language in paragraph (5) providing federal court

jurisdiction for actions involving the Secretary of Agriculture. 16 U.S.C. § 544m(b)(5).

Petitioner's argument also renders paragraph (6) of the judicial remedies section of the Scenic Act meaningless. This provision in the Act specifically provides jurisdiction in state court for actions involving "any appeal of any order, regulation, or other action of the Commission or a county taken pursuant to paragraph (4) of this subsection." 16 U.S.C. § 544m(b)(6). (emphasis supplied)

In addition, after Congress passed the Scenic Act, Oregon and Washington adopted the Columbia River Gorge Compact. Or. Rev. Stat. § 196.150; Wash. Rev. Code § 43.97. The Compact incorporated the provisions of the Act and they are "declared to be the law" of the state. Or. Rev. Stat. § 196.150; Wash. Rev. Code 43.97.015. The Compact established the authority of the Gorge Commission "to perform all functions and responsibilities in accordance with the provisions" of its terms and those of the

Scenic Act. Or. Rev. Stat. § 196.150; Wash. Rev. Code 43.97.015.

The Compact does not contain any language that suggests the states gave up jurisdiction to review land use decisions of the regional agency they created. On the contrary, Oregon and Washington have vigorously contended the Scenic Act and the Compact are the "product of mutual cooperation between federal and state governments to achieve a result satisfactory to both states." Columbia Gorge United v. Yeutter, supra at 112.

Moreover, the Compact between the states is a contract. Green v. Biddle, supra, 92. The provisions of the Compact are equally obligatory on citizens of both states which provides the "uniform system of laws" the Scenic Act created. Poole v. Fleeger, 11 Pet. 185, 210 (1837); 16 U.S.C. § 544c(b). The interstate agency, in applying these laws, ensures they are binding on development activities in both states.

The Court deals with the Compact the way it is structured. Texas v. New Mexico, supra, 565. (rejecting attempt to amend

provisions of compact by interpretation) The Court also does not engage in formulating policy. "...where the words of the law, treaty or contract have a plain and obvious meaning, all construction, and hostility with such meaning, is excluded." Green v. Biddle, supra, 89-90.

In addition, the legislative history also supports the plain meaning of the statute. Congress considered but did not adopt a bill which would have provided for exclusive federal court jurisdiction for all actions brought against the Gorge Commission pursuant to the Scenic Act. H.R. 4161, 99th Cong. 2d Sess. (1986); H.R. 5583, 99th Cong. 2d Sess. (1986); H.R. 5625, 99th Cong. 2d Sess. (1986) In its place, the Senate passed S. 2055, which mandated federal court jurisdiction in cases involving criminal actions brought under the Scenic Act and in cases concerning activities of the Secretary. In a section by section analysis of the bill, the provisions of the judicial review section were specifically analyzed. 99 Congr. Rec. S 15645 (Oct. 8, 1986).

The House passed H.R. 5705, which eventually became the Scenic Act. In reviewing H.R. 5705, Senator Gorton, a prime sponsor of the legislation in the Senate, noted "it is extremely close to the bill [S. 2055] that the Senate passed on October 8th." Cong. Rec. S 16878 (Oct. 17, 1986). In terms of the judicial review provisions, the two bills were exactly the same. Congress even rejected an attempt by Representative Robert Smith to amend the judicial review section in the House to provide federal court jurisdiction. Congr. Rec. H 11139 (Oct. 16, 1986); Congr. Rec. H 11142-43 (Oct. 16, 1986).

There is no doubt about the allocation of jurisdiction by Congress between the state and federal courts in the Scenic Act. The language is consistent with the state and federal relationship that was forged in the Compact. Federal courts have jurisdiction limited to cases where an action of the Secretary of Agriculture is challenged or a criminal penalty is sought. State courts have

jurisdiction over decisions of the Gorge Commission.[10] For these reasons, the policy choices regarding jurisdiction have been resolved by Congress and petitioner does not present a question that merits review by this Court.

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[10]The U.S. Magistrate found another case involving construction of the Scenic Act was applicable:

> Plaintiff seeks a declaratory judgment finding unlawful the Commission's refusal to allow plaintiffs proposed property division. A similar situation arose in Columbia Gorge United v. Yeutter, CV No. 88-1319-PA (May 23, 1990). Plaintiffs in Yeutter were land owners who sought permission from the Commission to develop their land within the Columbia Gorge Scenic Area. The Commission denied plaintiffs' requests and plaintiffs' appeals. Plaintiffs brought their action in this court. Judge Panner dismissed the action, stating in dicta that "[t]he Gorge Act and the Compact specify that jurisdiction over appeals or challenges to commission or county actions be placed in state courts, while providing jurisdiction to review action taken by the secretary [of agriculture] in federal district court. 16 U.S.C. § 544m(b)(4-6). Id. at 30. Although the quoted passage from Yeutter is dicta, I accept it as persuasive authority.

Magistrate's Findings and Recommendation, A 38

II. The Hypothetical Assertion of Federal Question Jurisdiction For Review Of A Land Use Decision Under The Columbia River Gorge National Scenic Area Act Does Not Present A Question That Merits Review By This Court

While dressed in the garb of federal question jurisdiction, petitioner's thrust is a request for review of a land use decision of an agency established by an agreement or compact between two states. The taking claim is not before the Court and petitioner does not raise a constitutional question. Moreover, there is no conflict between the states and they are not parties in the appeal.

Petitioner's plea for federal court jurisdiction is based on a hypothetical situation and not the facts in this case. The petition states as follows:

> If, however, disputes regarding the Gorge Commission's authority could be adjudicated only in the state courts of Oregon and Washington, the fundamental goal of interstate uniformity could be frustrated. The Commission would be subject to the competing, inconsistent, and perhaps inevitably irreconcilable mandates of the courts of two co-equal sovereigns.

(Petition, 18-19)

Quite to the contrary, this is not a case where "uniformity" has been frustrated or the Gorge Commission subject to "inconsistent" or "irreconcilable" mandates. The pleadings and the record do not establish any conflict in state court decisions or any lack of uniformity in review of a land use decision of this kind.[11] Petitioner simply fails to establish why jurisdiction in the courts of Washington and Oregon raises a substantial federal question this Court should review.

Moreover, the Ninth Circuit correctly concluded that since the Scenic Act is more specific than the general federal jurisdiction statute, the Scenic Act must control. Busic v. United States, 446

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[11]The Gorge Commission has rendered 1200 development review decisions since 1987. These decisions have given rise to several appeals or legal challenges. All of the land use decisions have been heard in the state courts of Oregon and Washington. See, Miller v. Columbia River Gorge Commission, 118 Or. App. 553, 848 P2d 629 (1993) (proposed land division and taking claim); Schaefco v. Columbia River Gorge Commission, 112 Wn.2d 366, 849 P2d 1225 (1992) (proposed development). Other cases currently pending include Bryant v. Columbia River Gorge Commission, Oregon Court of Appeals No. A75952 (quarry operation and taking claim) and Tucker v. Columbia River Gorge Commission, Washington Court of Appeals No. 14748-3-II (proposed land division and taking claim).

U.S. 398, 406 (1980) This result is especially compelling because jurisdiction is a critical component of the Act and the Compact the states adopted which preserves traditional notions of federalism. What Congress and the states have provided for jurisdiction to review this land use decision does not merit review by this Court.

In addition, any decision by this court interpreting the Scenic Act will have little bearing on other interstate compacts. Each compact has it own congressional authorization with specific purposes and standards. Thus, this case does not present an issue that will contribute to the understanding of compact law in general.

The Ninth Circuit's determination that the taking claim was not ripe supports this conclusion as well. Petitioner failed to seek compensation from Oregon or Washington prior to suit in federal court. Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194-195 (1984). If a litigant could pursue a taking claim in state court and a challenge to the same underlying land use decision in federal court simultaneously, it would nullify the

"uniform system of laws" provided in the Scenic Act and the Compact. 16 U.S.C. § 544c(b). Such needless conflict would entrap citizens in a labyrinth Congress and the states carefully eliminated. Petitioner has a forum for appeal in state court and has not shown why this Court should consider federal court jurisdiction with the facts presented.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted this 12th day of August, 1993.

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92-1772

Supreme Court, U.S.
FILED
AUG 13 1993
OFFICE OF THE CLERK

No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

BROUGHTON LUMBER CO.,

Petitioner,

v.

COLUMBIA RIVER GORGE COMMISSION, et al.,

Respondents.

SUPPLEMENTAL APPENDIX TO RESPONDENTS BRIEF IN PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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August 1993

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SUPPLEMENTAL APPENDIX INDEX

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1.	First Amended Complaint . . . . . May 19, 1989	Supp. A 1-10

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

BROUGHTON LUMBER CO., a Washington corporation,	)	
Plaintiff,	)	Civil No. 89-234-JU
v.	)	FIRST AMENDED COMPLAINT
COLUMBIA RIVER GORGE COMMISSION, THE STATE OF OREGON, THE STATE OF WASHINGTON, and CLAYTON K. YEUTTER, the Secretary of Agriculture of the United States, United States, and the UNITED STATES OF AMERICA,	)	(Columbia River Gorge National Scenic Area Act; Inverse Condemnation
Defendants.	)	(Demand for Jury Trial)

I. INTRODUCTION

1. In this action, plaintiff challenges the refusal of the Columbia River Gorge Commission to allow the division of certain property owned by plaintiff in the Columbia River Gorge National Scenic Area for residential development. Plaintiff seeks a declaratory judgment that the Gorge Commission's refusal to allow the property is unlawful. Alternatively, in the event this Court were to conclude that the Gorge Commission properly exercised its regulatory authority, the Gorge Commission's action has resulted in a taking of plaintiff's property without just compensation. Plaintiff seeks damages of $250,000 plus interest, costs and attorney's fees for the uncompensated taking.

II. JURISDICTION AND VENUE

2. Plaintiff's federal claims arise under the Columbia River Gorge National Scenic Area Act; 16 U.S.C. § 544, and the Fifth Amendment to the United States Constitution. This Court has jurisdiction over plaintiff's federal claims under 28 U.S.C. § 1331, 2201 and 2202. This Court has pendent jurisdiction over

plaintiff's state claims, which arise under the Constitution of Oregon and Washington.

3. Venue is proper in this district pursuant to 28 § 1391(e)(1) as well as 28 U.S.C. §1391(b) and (e)(2).

II. PARTIES

4. Plaintiff Broughton Lumber Co. is a Washington corporation and owner of property within the Columbia River Gorge National Scenic Area (Scenic Area). The property involved in this action is located on the bluff on the Washington side of the Columbia River near White Salmon, Washington.

5. The Columbia River Gorge Commission was established pursuant to a bi-state compact between the states of Oregon and Washington, which was consented to by Congress in the Columbia River Gorge National Scenic Area Act (Gorge Act). The Commission is a political subdivision of the states of Oregon and Washington.

6. The states of Oregon and Washington are parties to the bi-state compact creating the Columbia River Gorge

Commission and each state jointly funds the Commission's activities.

7. Defendant Clayton K. Yeutter is the Secretary of the United States Department of Agriculture and the federal official responsible for the implementation of the Gorge Act. In June of 1987, the Secretary adopted interim land use guidelines which govern private land within the Scenic Area. The Gorge Commission applies the Gorge Act and the Secretary's interim guidelines in examining land use applications which come before the Commission.

8. At all relevant times, the Gorge Commission, the states of Oregon and Washington, the Secretary of Agriculture and the United States were engaged in a joint undertaking to regulate the use and development of property in the Scenic Area.

IV. FIRST CLAIM FOR RELIEF

(Declaratory Judgment)

9. In August, 1988, plaintiff submitted a land use application to the Commission to subdivide certain bluff property

in the Scenic Area into three parcels. On October 25, 1988, the Executive Director of the Commission denied plaintiff's request. Plaintiff appealed this decision to the Commission. Following a hearing on January 10, 1989, the Commission denied the appeal in a final order dated January 24, 1989.

10. The Commission erred in denying plaintiff's application in one or more of the following particulars:

a. in erroneously interpreting and applying the Standards in the Gorge Act and the regulations promulgated thereunder;

b. in issuing an order no supported by substantial evidence; and

c. by considering evidence not in the record.

11. The Commission's action adversely affects plaintiff and is contrary to law. Pursuant to 16 U.S.C. § 544m(b)(4), a declaratory judgment should issue setting aside and terminating the Commission's action as invalid.

V. SECOND CLAIM FOR RELIEF

(Inverse Condemnation Against the Gorge Commission and the States of Oregon and Washington)

12. The denial of plaintiff's application has effected a taking by the defendant Commission and defendants Oregon and Washington of plaintiff's property.

13. The taking was of private property for a public use.

14. No compensation has been offered or received for the taking.

15. Defendants Oregon, Washington and the Commission violated the Fifth Amendment of the United States Constitution as applied to the states through the 14th Amendment by effecting a taking of plaintiff's property without just compensation.

16. Defendants Washington and the Commission violated Article I, Section 16 of the Washington Constitution by their action.

17. Defendants Oregon and the Commission violated Article I, Section 18 of the Oregon Constitution by their action.

18. Washington, Oregon and the Commission are liable to plaintiff for $250,000 in just compensation for their taking.

19. Defendants Washington and the Commission are liable to plaintiff for its costs and reasonable attorneys fees under RCW 8.25.070.

20. Defendants Oregon and the Commission are liable to plaintiff for its costs and reasonable attorneys fees under ORS 20.085.

VI. THIRD CLAIM FOR RELIEF

(Declaratory Judgment Action Against the Secretary and the United States)

21. The standards in the Gorge Act and the implementing regulations promulgated by the Secretary required the Commission to effect a taking of plaintiff's property without just compensation.

22. Plaintiff is entitled to a declaration that the United States and the Secretary have thereby effected an unconstitutional taking of plaintiff's property.

23. Defendants United States and Secretary of Agriculture are liable to plaintiff for its costs and reasonable attorney fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, and for interest from the date of taking pursuant to the Declaration of Taking Act, 40 U.S.C. § 258a.

VII. FOURTH CLAIM FOR RELIEF

(Inverse Condemnation Against the Secretary and the United States)

24. Plaintiff realleges paragraphs 21 and 23.

25. As a result of the unconstitutional taking of plaintiff's property, defendants United States and Secretary of Agriculture owe plaintiff just compensation in the amount of $250,000.

WHEREOF, plaintiff prays for relief as follows:

1. On its first claim for relief, for a declaratory judgment that the Commission erred in denying plaintiff's application;

2. On its second claim for relief, for judgment against the Commission, Washington and Oregon for $250,000 in compensation owed for the taking, along with its reasonable costs and attorneys fees;

3. On its third claim for relief, a declaratory judgment that the Secretary and the United States effected an unconstitutional taking without just compensation through the Gorge Act's standards and implementing regulations.

4. On its fourth claim for relief, for judgement against the United States and the Secretary of Agriculture for $250,000 in compensation owed for the taking, along with its costs and reasonable attorney's fees.

5. For such other relief as may be just and proper.

DATED this 19th day of May, 1989.

HAGLUND & KIRTLEY

By

Michael E. Haglund
Attorneys for Plaintiff

(5)

FILED
AUG 31 1993
OFFICE OF THE CLERK

No. 92-1772

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1992

BROUGHTON LUMBER CO.,

Petitioner,

v.

COLUMBIA RIVER GORGE
COMMISSION, et al.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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August 1993

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This case presents novel and important issues worthy of this Court's review: At a time when interstate compact agencies are proliferating as instruments of regional resource management, what is the susceptibility of such agencies to federal court jurisdiction?

In its opposition to certiorari, the respondent Columbia River Gorge Commission attempts to deflect the Court's interest through a variety of devices, ranging from a suggestion of "mootness" (albeit in a footnote), to denigration of the underlying controversy as "simply a request for review of a land use decision," to an inaccurate description of the legislative history of the operative jurisdictional provisions of the Columbia River Gorge National Scenic Area Act.

Each of these devices should be dispelled. Briefly:

(1) The Commission's suggestion of "mootness" is utterly unsupported by the record. Indeed, that footnoted suggestion (See Brief in Opposition at 9 n.5) does not include a single reference to the record.

If, however, this Court elects to consider matters outside the record, the suggestion of "mootness" is demonstrably false. Contrary to respondent's assertion, the Commission has never "approved petitioner's proposal for a commercial resort on the same property that is the subject of this case." (Indeed, if such approval had issued, petitioner long ago would have devoted its resources to working its land, rather than pursuing the Gorge Commission from Yakima, to San Francisco, to Washington, D.C.) Rather, the Commission's action to which respondent refers: (1) focused on a neighboring parcel, only marginally overlapping the subject parcel; (2) in no way permitted the residential

construction which Braughton Lumber sought, and seeks; and (3) in any event, was never built.

Nor have the underlying land use guidelines been succeeded by county ordinance--and there is no way of knowing when, if ever, Skamania County would adopt such an ordinance. In any event, the Commission does not--indeed, cannot--assert that any ordinance would materially deviate from existing guidelines.

(2) This case, in this Court, is not about "land use," but about jurisdiction. Whatever the underlying substantive claim, the focus in this Court (as in the Ninth Circuit) was on the Gorge Commission's susceptibility to federal court jurisdiction, either generally via federal question jurisdiction, or specifically via the Gorge Act's concurrent jurisdiction provisions. See 16 U.S.C. § 544m(b)(4).

These jurisdictional issues are universal, not specific. They arise anytime a party seeks injunctive or declaratory relief against an interstate compact agency--and, thus,

transcend the "land use" particulars of Broughton Lumber Co.'s claims against the Columbia River Gorge Commission.

(3) Finally, the respondent Gorge Commission trumpets that the Gorge Act provides for state court jurisdiction over the Commission. See Brief in Opposition at 20-22. This is a non sequitur. Of course, the Act provides for such jurisdiction; petitioner has never argued otherwise.

But just as clearly, the Act provides for concurrent federal court jurisdiction over the Gorge Commission. See 16 U.S.C. § 544m(b)(4). It is this explicit concurrency that the Commission ignores. Neither the Commission, nor the Ninth Circuit, has ever offered a plausible construction of § 544(m)(b)(4) that would give that provision substance without conferring federal jurisdiction.

Rather than confronting the inescapable concurrent jurisdiction consequences of § 544(m)(b)(4), the Commission distorts the legislative history of the Gorge Act's jurisdictional

provisions. See Brief in Opposition at 20-21. Specifically, the Commission asserts that congressional rejection of "an attempt by Representative Robert Smith to amend the judicial review section in the House to provide federal court jurisdiction" is proof positive that Congress intended to confer exclusive jurisdiction in the courts of Oregon and Washington to adjudicate disputes involving the Gorge Commission. Id.

In reality, congressional rejection of Representative Smith's amendment confirmed concurrent jurisdiction. Representative Smith sought to amend the Gorge Act to provide for exclusive federal jurisdiction and venue:

> The courts of the United States shall have exclusive jurisdiction of actions arising under this Act, and venue shall be in the United States District Courts for Washington or Oregon.

132 Cong. Rec. ¶ 11, 139 (daily ed. Oct. 16, 1986). Thus, by rejecting this proposal, Congress merely reiterated its commitment to concurrent jurisdiction, as embodied in § 544m(b)(4).

CONCLUSION

Because this case raises exceptionally important questions of federal jurisdiction over interstate compact agencies, petitioner respectfully requests that the Court grant the petition for writ of certiorari.

Respectfully submitted this 31st day of August, 1993.

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